

No. 9553

United States

Circuit Court of Appeals

For the Ninth Circuit.

Vol
2215

JOSEPH GOLDIE,

Appellant,

vs.

STERLING CARR, Receiver of Estate of Herbert
Fleishhacker, Debtor,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

FILED

JUL 18 1940

PAUL P. O'BRIEN,

No. 9553

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic: and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellee

In the United States District Court for the North-
ern District of California, Southern Division

No. 30924-S

In the Matter of HERBERT FLEISHHACKER,
Debtor.

PETITION FOR SUMMARY ORDER DI-
RECTED TO JOSEPH GOLDIE TO TURN
OVER TO RECEIVER CERTAIN SECURI-
TIES AND MONEYS BELONGING TO
DEBTOR:

To the Honorable Judges of the United States Dis-
trict Court for the Northern District of Cali-
fornia, and to Honorable Burton J. Wyman,
Referee in Bankruptcy for said Court, at San
Francisco, California:

The petition of Sterling Carr respectfully repre-
sents:

I.

That ever since the 26th day of January, 1939

petitioner has been and now is the duly and regularly appointed, qualified and acting Receiver for the estate of Herbert Fleishhacker, the above named Debtor;

II.

That at all of the times herein mentioned, Rainier Brewing Company, Inc. was and now is a corporation incorporated, organized and existing under and by virtue of the laws of the [1*] State of California, duly authorized to do business, and doing business, in said State, and with its principal place of business in the City and County of San Francisco, in said State;

That the capital stock of said corporation is divided into shares of "Class "A" common stock and Class "B" common stock;

III.

That at all of the times herein mentioned, Pacific Products, Inc. was and now is a corporation incorporated, organized and existing under and by virtue of the laws of the State of California, duly authorized to do business, and doing business, in said State, and with its principal place of business in the City and County of San Francisco, in said State;

IV.

That upon the 29th day of September, 1937, Herbert Fleishhacker, the Debtor herein, and Joseph Goldie made and entered into a written agreement,

*Page numbering appearing at foot of page of original certified Transcript of Record.

a copy of which is hereunto annexed, marked "Petitioner's Exhibit A" and made a part hereof, as fully as if set forth in full herein;

V.

That amongst the assets of said Debtor delivered to your Receiver were certain claims of said Debtor against the said Joseph Goldie in accordance with the terms and provisions of said agreement, a copy of which is hereunto annexed;

VI.

That in accordance with the terms of said agreement, said Joseph Goldie agreed, within a period of two years from September 29, 1937, to deliver to said Herbert [2] Fleishhacker three thousand (3000) shares of the Class "A" common stock of said Rainier Brewing Company, Inc., and further agreed, as collateral for the performance of the terms of the aforementioned agreement, to deliver to the said Herbert Fleishhacker, five hundred thirtynine (539) shares of Class "A" Cumulative Preferred stock of Pacific Products, Inc. immediately after the execution of said agreement;

VII.

That in accordance with the terms of said agreement, said Joseph Goldie further agreed to deliver to Herbert Fleishhacker, said Debtor, any and all dividends received by the said Goldie declared on and after the 29th day of September, 1937 upon said 3,000 shares of the Class "A" common stock of Rainier Brewing Company, Inc.

VIII.

Petitioner further alleges that the said Joseph Goldie at all of the times herein mentioned, up to and including the 23d day of November, 1938, has failed and refused to deliver to the said Herbert Fleishhacker said 539 shares of Pacific Products, Inc. Class "A" 7% Cumulative Preferred stock as collateral under the terms of said agreement;

That the said Goldie has also failed to deliver to the said Herbert Fleishhacker any or all of the dividends that the said Goldie has received since September 29, 1937 upon said 3,000 shares of Class "A" common stock of Rainier Brewing Company, Inc., save and except the sum of eighteen hundred (1800) dollars which was paid on the 20th day of September, 1938; [3]

IX.

That petitioner further alleges that the following dividends have been declared by said Rainier Brewing Company, Inc. on Class "A" common stock, the proceeds of which have been received by the said Joseph Goldie, to wit:

October	21, 1937—	\$1.30	per share
November	20, " —	.15	"
Sept.	16, 1938—	.60	"
October	24, " —	1.15	"
December	29, " —	.60	"

Payable as follows:

January	10, 1939—	20¢	per share
February	" " —	"	"
March	" " —	"	"

Petitioner alleges that the said Joseph Goldie, on and after the 29th day of September, 1937 and up to the present date, has received the total sum of \$11,400.00 on said 3,000 shares of common stock of Rainier Brewing Company, Inc. as dividends, and which dividends, under the terms of said agreement herein referred to, were agreed to be paid by the said Goldie to the said Herbert Fleishhacker; that no part of said sum has been paid to the said Herbert Fleishhacker save and except said sum of \$1,800.00; that there is now due and payable to the said Herbert Fleishhacker, Debtor herein, and to Sterling Carr, Receiver for the estate of said Debtor, the sum of nine thousand six hundred & 00/100 (9,600) dollars;

X.

Your petitioner further alleges that demand has been made upon the said Joseph Goldie by your petitioner as Receiver for the estate of Herbert Fleishhacker, Debtor, for the delivery to said Receiver of said 539 shares of Pacific Products, Inc. to be held by said Receiver as collateral under the terms of said agreement, and for the sum of \$9,600. due the said Herbert Fleishhacker in accordance with the terms of said agreement; [4] that at all of the times herein referred to, the said Joseph Goldie has failed and refused and still fails and refuses, without right or cause, to deliver to your petitioner the said 539 shares of Pacific Products, Inc. or said sum of \$9,600.00 or any part thereof;

XI.

That in accordance with the terms of said agreement, a copy of which is attached hereto and marked "Exhibit A", the said Herbert Fleishhacker, Debtor herein, at all of the times herein mentioned was and now is entitled to delivery to him of said 539 shares of Pacific Products, Inc.; that the said Joseph Goldie is now holding said 539 shares in trust for the said Herbert Fleishhacker;

That since the execution of said agreement the said Joseph Goldie has received the total sum of \$11,400.00 as dividends on said 3000 shares of Class "A" common stock of Rainier Brewing Company, Inc.; that by the terms of said agreement, the said Herbert Fleishhacker is entitled to receive said sum, but that no part thereof has been paid to said Herbert Fleishhacker save and except said sum of \$1,800.00, and that said Joseph Goldie is now holding the balance of said dividends, to wit, the sum of \$9,600.00, in trust for the said Herbert Fleishhacker, the Debtor above named;

Wherefore, petitioner prays:

(1) That this Court issue its order directed to the said Joseph Goldie, to show cause, if any he has, upon a date certain, to be fixed by this Court, why he should not be ordered, compelled and required to turn over and deliver to petitioner as such Receiver, 539 shares of Class "A" 7% Cumulative Preferred stock of Pacific Products, Inc. in accordance with the terms of said agreement specifically set forth in said Petitioner's Exhibit "A" attached

hereto, together with dividends aggregating [5] the sum of \$9,600.00 due petitioner as such Receiver in accordance with the provisions of said agreement;

(2) And for such further and additional relief as this Court shall deem proper.

STERLING CARR,

Receiver for the Estate of
Herbert Fleishhacker,
Debtor,

Petitioner.

FRANCIS P. WALSH,

LOUIS J. GLICKSBERG,

Attorneys for Petitioner. [6]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Sterling Carr, being first duly sworn, deposes and says:

That he is the petitioner named and described in the foregoing petition; that he has read the same and knows the contents thereof, and hereby makes solemn oath that the statements therein contained are true according to his best knowledge, information and belief.

STERLING CARR.

Subscribed and sworn to before me this 29th day of March, 1939.

[Seal]

LOUIS WIENER,

Notary Public in and for the City and County of
San Francisco, State of California. [7]

PETITIONER'S EXHIBIT "A"
AGREEMENT

Whereas, Joseph Goldie is obligated to Herbert Fleishhacker entitling the said Herbert Fleishhacker to receive from the said Joseph Goldie, 3,000 shares of the Rainier Brewing Company, Inc., a corporation, Class "A" common stock; and

Whereas, the said Joseph Goldie desires to assure the said Herbert Fleishhacker of the ultimate payment of said obligation for the delivery of said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock; and

Whereas, Pacific Products, Inc., a corporation, is the owner of 59,622 shares of the Class "A" common stock of the Rainier Brewing Company, Inc., a corporation, and 258,092 shares of the Class "B" common stock of the Rainier Brewing Company, Inc., a corporation; and

Whereas, Joseph Goldie is the owner of 1924-4/10ths shares of the Class "A" 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation; and

Whereas, it is the desire of the parties hereto that the said Joseph Goldie pledge to Herbert Fleishhacker so much of the Class "A" 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation, owned by him as will secure to the said Herbert Fleishhacker the ultimate delivery to him by [8] said Joseph Goldie of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock.

Now therefore, this agreement,

Witnesseth:

That the parties hereto shall forthwith upon the execution of this agreement cause to be delivered to the transfer agent of Pacific Products, Inc., a corporation, the stock certificate now standing in the name of Joseph Goldie, representing his ownership of 1,924-4/10ths shares of Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock, with directions to said transfer agent and company to split said certificate into one certificate of 539 shares and one certificate of 1,385-4/10ths shares, each of said certificates as split to be reissued by said company and said transfer agent in the name of Joseph Goldie.

It is further mutually agreed and understood between the parties hereto that said certificate representing 539 shares of Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock, shall be forthwith by said Joseph Goldie endorsed and delivered to said Herbert Fleishhacker, and shall thenceforth be held in pledge by said Herbert Fleishhacker, subject however to the following express agreements.

That the said Joseph Goldie may at any time within two years from the date of this agreement acquire and deliver to the said Herbert Fleishhacker 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock, and upon [9] delivery of such stock of Rainier Brewing

Company, Inc., a corporation, the said Pacific Products, Inc., a corporation, stock hereby pledged shall be forthwith returned to the said Joseph Goldie by the said Herbert Fleishhacker, and the said obligation of each of the parties hereto shall thereby stand discharged in full.

It is further expressly agreed and understood that the said Joseph Goldie may at any time within two years of the date of this agreement pay in lawful money of the United States of America to the said Herbert Fleishhacker, the equivalent of the market value at the time of said payment of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock, and shall thereupon be entitled to the return of the stock of the Pacific Products, Inc., a corporation, hereinabove provided to be pledged to the said Herbert Fleishhacker, and thereupon the obligation of the parties hereto, each to the other, shall stand discharged in full.

It is further expressly agreed and understood that Joseph Goldie may at any time within two years of the date of this agreement pay to the said Herbert Fleishhacker in lawful money of the United States of America, the equivalent of the market value at the time of said payment of not less than 750 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock, and shall thereupon be entitled to the return of 25% of the Pacific Products, Inc., a corporation, [10] stock hereby pledged to the said Herbert Fleishhacker,

and upon each successive payment of not less than 25%, or the delivery of not less than 750 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock to the said Herbert Fleishhacker, shall forthwith be entitled to the return of an additional 25% of the said stock hereby pledged to the said Herbert Fleishhacker, until such time as the full amount of said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock, has been delivered to the said Herbert Fleishhacker, or the full amount of the value of the said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock has been paid to the said Herbert Fleishhacker.

It is further expressly understood and agreed that Joseph Goldie may at his option at any time within two years from the date of this agreement, sell, transfer or set over absolutely to the said Herbert Fleishhacker 450 shares of Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock, and upon such transfer of said 450 shares to the said Herbert Fleishhacker the obligation of the parties hereto, one to the other, shall stand discharged in full.

It is further expressly understood and agreed that during the life of this agreement any dividends declared and paid by the said Pacific Products, Inc., a corporation, on the said shares of stock hereby deposited with the said Herbert [11] Fleishhacker, which dividends are paid from funds ac-

quired by the said Pacific Products, Inc. from any source other than from moneys paid to it as dividends on stock owned by it of Rainier Brewing Company, Inc., a corporation, shall not be payable to the said Herbert Fleishhacker but shall constitute dividends payable to the said Joseph Goldie.

It is further expressly understood and agreed that during the life of this agreement that as to all dividends declared and paid by the Rainier Brewing Company, Inc., a corporation, to Pacific Products, Inc., a corporation, which in turn give rise to payments of dividends by the Pacific Products, Inc., a corporation, to its stockholders, the said Herbert Fleishhacker shall receive such portion of such dividends as would be paid to him were he the owner of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock.

It is further expressly understood and agreed that the provisions of the within agreement embrace the entire agreement on the subject matter between the parties hereto, and cancels, supersedes and replaces all prior and other agreements, and the benefits and obligations herein set forth flowing to and from each of the parties hereto shall inure to and be binding upon the heirs, administrators and assigns of the parties hereto. [12]

In witness whereof, we have hereunto set our hands and seals this 29th day of September, 1937.

(Signed) JOSEPH GOLDIE

(Signed) HERBERT FLEISHHACKER

[Endorsed]: Filed Apr. 3, 1939. [13]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE DIRECTED TO
JOSEPH GOLDIE

Sterling Carr, Receiver for the estate of Herbert Fleishhacker, the Debtor above named, having filed herein his petition praying for an order directed to Joseph Goldie, to show cause why he should not be compelled and required to turn over and deliver to said Receiver 539 shares of Class "A" 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation, in accordance with the provisions of a certain agreement specifically set forth in said petition, together with dividends in the sum of \$9,600.00 due petitioner as such Receiver in accordance with the terms of said agreement; and

Good cause appearing therefor, it is hereby ordered that said Joseph Goldie show cause, if any he has, before the undersigned Referee in Bankruptcy at his courtroom, Room 609 [14] Grant Building, 1095 Market Street, San Francisco, California, on the 14th day of April, 1939, at the hour of 10 A. M., why said petition of said Receiver should not be granted; and

It is further ordered that a copy of this order to show cause, together with a copy of said petition, be served upon the said Joseph Goldie at least 5 days before the return date hereof.

Dated: April 3rd, 1939.

BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed Apr. 3, 1939. [15]

[Title of District Court and Cause.]

VERIFIED PLEA OF RESPONDENT JOSEPH
GOLDIE OBJECTING TO THE SUMMARY
JURISDICTION OF THE ABOVE EN-
TITLED COURT AND FOR AN ORDER
QUASHING SERVICE OF ORDER TO
SHOW CAUSE DIRECTED TO SAID RE-
SPONDENT AS ISSUED BY THE ABOVE
ENTITLED COURT.

To the Honorable, the Judges of the United States
District Court for the Northern District of
California, and to Honorable Burton J.
Wyman, Referee in Bankruptcy for said Court
at San Francisco, California:

Now comes Joseph Goldie, of the City and County
of San Francisco, State and District afóresaid, *re-
spondent* to an order to show cause issued by the
above entitled court on the [16] 3d day of April,
1939, and returnable on the 14th day of April,
1939, and appearing specially and not otherwise for
the purpose of objecting to the summary jurisdic-
tion of the above entitled court and moving said
court for an order quashing the service of said
order to show cause, and for grounds of his plea
objecting to the jurisdiction of the above entitled
court alleges:

1. That it affirmatively appears from the pe-
tition of the receiver, Sterling Carr, upon which
said order to show cause was issued by the above

entitled court, that the above entitled court was and is without jurisdiction to hear and determine the matters therein stated or to make any order against the respondent therein named except by consent of this respondent, and that this respondent has never consented to submit himself to the jurisdiction of the above entitled court, but, on the contrary, this respondent has declined and does decline to submit himself to the jurisdiction of the above entitled court to hear and determine any of the matters set forth in said receiver's petition or be subjected to any orders of the above entitled court pertaining to any of the matters set forth in said receiver's petition.

2. That it affirmatively appears from the face of said receiver's petition and the order to show cause issued by the above entitled court, that the facts stated in said receiver's petition do not confer upon the above entitled court summary jurisdiction over said respondent without his consent.

3. That it affirmatively appears from said receiver's petition, upon which said order to show cause was issued, and from said order to show cause, that the issues which the receiver seeks to submit to the above entitled court as grounds for the granting of the prayer of said petition can only be determined in a plenary action and not in a summary proceeding instituted by said receiver herein, and it affirmatively appears from said petition that no summary jurisdiction can be exercised by the

[17] above entitled court as it relates to this respondent without the consent of this respondent.

That this respondent is entitled to have said issue determined in a plenary action and to have a trial by jury of the issues raised in said petition pursuant to his demand.

For a further, separate and distinct objection to the summary jurisdiction of the above entitled court, this respondent alleges as follows, to-wit:

That at the time of the making of the contract, a copy of which is attached to the petition of the receiver herein, the property referred to in said contract as constituting one thousand nine hundred twenty-four and four-tenths (1,924 $\frac{4}{10}$) shares of the preferred stock of Pacific Products, Inc., a corporation, Class "A" Cumulative 7%, was not in the possession of respondent, Joseph Goldie, nor in the possession of Herbert Fleishhacker, but, on the contrary, said stock, and each and every share thereof, had been theretofore pledged by respondent to the Anglo California National Bank to secure the repayment by respondent of a sum of money owing by respondent to said Anglo California National Bank, aggregating at the time of the making of said contract the sum of One Hundred Thirty-six Thousand Six Hundred Thirty-eight and $\frac{62}{100}$ Dollars (\$136,638.62);

That said stock, and each and every share thereof, was held by said Anglo California National Bank as security for the repayment by respondent of the sum of money hereinabove set forth;

That at the time of the making of said contract, it was agreed that Herbert Fleishhacker and respondent would obtain a release by said Anglo California National Bank of so much of said stock as was agreed in said contract would be deposited with the said Herbert Fleishhacker, to-wit, five hundred thirty-nine (539) shares;

That at no time prior to the making of said contract [18] or at the time of the making thereof was the respondent the owner of any shares of Rainier Brewing Company, Inc., a corporation, Class "A" Common Stock, but all of the interest of said respondent in said Rainier Brewing Company, Inc., a corporation, was represented by respondent's ownership, subject to the pledge to the Anglo California National Bank, as aforesaid, of the one thousand nine hundred twenty-four and four-tenths (1,924 $\frac{4}{10}$) shares of the Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock referred to in said contract, and at no time was it within the terms of the agreement between respondent and said Herbert Fleishhacker that both the five hundred thirty-nine (539) shares of Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock, and three thousand (3,000) shares of Rainier Brewing Company, Inc., a corporation, Class "A" Common stock, would be delivered to Herbert Fleishhacker in pledge.

Respondent further alleges that at the time of the making of said agreement, it was being dis-

cussed amongst the owners of all of the corporate stock of the Pacific Products, Inc., a corporation, that the assets of the Rainier Brewing Company, Inc., a corporation, would be transferred to Pacific Products, Inc., a corporation, and, thereupon, the name of the Pacific Products, Inc., a corporation, would be changed to that of the Rainier Brewing Company, Inc., a corporation, and that the Rainier Brewing Company, Inc., a corporation, then in existence at the time of the making of said contract would be dissolved, and upon the happening of said events respondent would have been in a position to deposit with the said Herbert Fleishhacker three thousand (3,000) shares of Rainier Brewing Company, Inc., a corporation, Class "A" Common stock, if and when said three thousand (3,000) shares were released from the pledge of the Anglo California National Bank;

That respondent was informed by Herbert Fleishhacker that if respondent would give to him an agreement pledging three [19] thousand (3,000) shares of Rainier Brewing Company, Inc., Class "A" Common stock, when the reorganization above referred to was accomplished, he, the said Herbert Fleishhacker, would be able to get released from the pledge of the Anglo California National Bank said three thousand (3,000) shares of Rainier Brewing Company, Inc., a corporation, Class "A" Common stock.

That thereafter, and on or about November 30th, 1937, all of the corporate assets of the Rainier

Brewing Company, Inc., a corporation, were transferred to Pacific Products, Inc., a corporation, and the name of the Pacific Products, Inc., a corporation, was changed to Rainier Brewing Company, Inc., a corporation. The Anglo California National Bank delivered to the transfer agent all of the stock in the Pacific Products, Inc., a corporation, owned by respondent. Said stock was cancelled and there was reissued in the name of respondent the number of shares necessary to represent respondent's new ownership in the Rainier Brewing Company, Inc., formerly known as Pacific Products, Inc., a corporation, whereupon, respondent and Herbert Fleishhacker requested the Anglo California National Bank to deliver to the said Herbert Fleishhacker three thousand (3,000) shares of Rainier Brewing Company, Inc., Class "A" Common stock, which the said Anglo California National Bank refused to do.

That the one thousand nine hundred twenty-four and four-tenths (1,924 $\frac{4}{10}$) shares of Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock referred to in said agreement between respondent and the said Herbert Fleishhacker were cancelled and became worthless.

That upon the refusal of said Anglo California National Bank to deliver to Herbert Fleishhacker three thousand (3,000) shares of the Rainier Brewing Company stock referred to hereinabove, the agreement of September 29th, 1937, became inoperative and of no force and effect; [20]

That it became necessary, by reason of said inability of the parties to carry out the terms of said agreement that a new agreement be made, in the meantime of which respondent made certain payments of money to Herbert Fleishhacker, aggregating the sum of One Thousand Eight Hundred Dollars (\$1,800.00).

That at no time since the making of said contract referred to herein have any shares of Rainier Brewing Company, Inc., a corporation, Class "A" Common stock, either of the old company or of the new company, or any of the stock of the Pacific Products, Inc., a corporation referred to in said contract, been in the possession, actual or constructive, of respondent or Herbert Fleishhacker, or of the Receiver of the estate herein, but, on the contrary, at all times said stock, and each and every share thereof has been and now is in the possession of the Anglo California National Bank and is subject to the terms of a contract of pledge between respondent and said Anglo California National Bank.

Respondent alleges that any order granting the prayer of the receiver herein would be in excess of the jurisdiction of the above entitled court and that it would be a physical impossibility to comply with any order of this court relative to Pacific Products, Inc., a corporation, stock, as said stock is no longer in existence; that any order against respondent in relation to Rainier Brewing Company stock formerly known as Pacific Products, Inc., a corpora-

tion, would be impossible to comply with as the possession, both actual and constructive, of each and every share of said stock is in the Anglo California National Bank, subject to the terms of the pledge by respondent.

That a true controversy exists between respondent and the estate herein as to what obligation, if any, respondent has to the said estate.

Wherefore, respondent prays that service of the order [21] to show cause issued by the above entitled court may be ordered quashed on account of lack of jurisdiction of the above entitled court to have issued said order to show cause.

JOSEPH GOLDIE,
Respondent.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Joseph Goldie, being first duly sworn, deposes and says:

That he is the respondent named and described in the foregoing Plea of objections to the summary jurisdiction of the above entitled court; that he has read said Plea, knows the contents thereof and hereby makes solemn oath that the statements therein contained are true, according to his best knowledge, information and belief.

JOSEPH GOLDIE.

Subscribed and sworn to before me this 12th day of April, 1939.

[Seal]

LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of a copy of the within Verified Plea of
Respondent is hereby admitted this 13 day of April,
1939.

FRANCIS P. WALSH,
LOUIS GLICKSBERG,
Attorneys for Receiver Sterling Carr.

[Endorsed]: Filed Apr. 13, 1939. [22]

[Title of District Court and Cause.]

Before: Honorable Burton J. Wyman, Referee in
Bankruptcy.

HEARING ON OBJECTION TO JURISDIC-
TION (JOSEPH GOLDIE)

Friday, April 21, 1939, 10 A. M.

Appearances:

Francis P. Walsh, Esq., and Louis J. Glicks-
berg, Esq., Attorneys for Receiver;
Harry S. Young, Esq., Attorney for Debtor;
Messrs. Torregano & Stark, by C. M. Stark,
Esq., Attorney for Joseph Goldie. [23]

The Referee: Take up the matter of Goldie.

Mr. Stark: In that matter, if the court please,
Mr. Goldie has filed a verified plea to the jurisdic-

tion of this Court to hear and determine any controversy between Mr. Carr and himself, and as I understand the procedure, your Honor is required as a matter of law to make inquiry into the foundation and basis of the attack on the jurisdiction of the Bankruptcy Court and to rule thereon; whereupon, as I recall the holding in the case of Pierson vs. Higgins, with which your Honor no doubt is familiar, it will become the duty of the receiver to establish the factual matters of his petition that would entitle him to any relief under his prayer and that the respondent, Mr. Goldie, would have the opportunity to present the factual matters that would tend to deny to the petitioner the relief sought under his prayer. I also understand it to be the law that where the respondent has filed a verified plea to the jurisdiction of this Court, that it becomes the duty of the receiver to establish the existence of jurisdiction. There is no presumption of the jurisdiction by the simple filing of the petition.

Mr. Walsh: If your Honor please, in reply to that contention, I might state that the receiver has met the presumption by his pleadings and when the plea to the jurisdiction is raised, the burden is upon the respondent to show at this time that this Court has no jurisdiction to go ahead in this matter. In other words, as the cases hold, the Court has the right to try out the entire matter on the plea to the jurisdiction and if the evidence shows that the con-

tention of the respondent is not meritorious or his right as against the receiver is colorable, then the Court is bound to go ahead and has the jurisdiction. In other words, we have alleged this matter in our pleading and have attached to the [24] pleading a copy of the agreement, to which there has been no meritorious defense—to that petition. ' I might state, if your Honor please, that we have set forth in our petition that Mr. Goldie, under this contract, owes Mr. Fleishhacker, the debtor, or the receiver now, the sum of money now due from dividends which were paid on stock of the Rainier Brewing Company. Now, I will point out to your Honor there is absolutely no issue raised in this answer on the plea to the jurisdiction or in the plea on the merits, which is set forth in this answer, raising any issue as to the payment of these dividends.

Mr. Stark: Of course, I cannot, as your Honor well knows, attack the jurisdiction of your Honor and in the same breath ask for anything affirmative. The scope of my pleading was to assert that no jurisdiction existed in this Court to determine any matters in regard to Mr. Goldie and there the pleadings stand. I think your Honor knows, irrespective of counsel's statement, that when your Honor has inquired into the question of jurisdiction and ruled, if by chance your ruling should be adverse to Mr. Goldie, thereupon we would have the opportunity to respond to the petition from a factual standpoint.

Mr. Walsh: If your Honor please, I might state at this time that in my own mind, the respondent is in court on his own answer, if your Honor has read it?

The Referee: I have read it, yes.

Mr. Walsh: He has set up an answer to the merits.

Mr. Stark: The scope of the pleading is limited by the prayer. If your Honor will examine the prayer, you will see exactly what is sought.

The Referee: You may proceed to put on the testimony on the question of jurisdiction. [25]

Mr. Walsh: Who is to proceed?

The Referee: It take it you are.

Mr. Glicksberg: Calling Mr. Goldie under Section 2055 of the Code of Civil Procedure.

The Referee: Very well.

JOSEPH GOLDIE,

called for the Receiver. Sworn.

Mr. Stark: May I make the point, if your Honor please, that Section 2055 is not applicable in this proceeding.

Mr. Glicksberg: If your Honor please, under the new rules I take it it certainly is applicable.

The Referee: If it develops that he is a party to this proceeding.

Mr. Glicksberg: He is a party before the Court.

Mr. Stark: I don't think it is of great importance.

(Testimony of Joseph Goldie.)

The Referee: Very well. Proceed, counsel.

Mr. Glicksberg: Q. Mr. Goldie, where do you reside?

The Witness: A. 2500 Steiner.

Q. What is your occupation? A. Brewer.

Q. Connected with?

A. Rainier Brewing Company.

Q. And how long have you been connected with the Rainier Brewing Company?

A. About 15 years.

Q. And the Rainier Brewing Company at the present time is a corporation duly authorized to do business under the laws of the State of California? A. Yes, sir.

Q. And has its principal place of business in the City and County of San Francisco?

A. Yes, sir.

Q. For the last two years, commencing, at least after September 29, 1937, you were an officer of the corporation? A. Yes, sir.

Q. Prior to September—— [26]

Mr. Stark: Mr. Glicksberg, wasn't it November 1st? No, you are correct.

Mr. Glicksberg: Q. Prior to September 29, 1937, you were also a stockholder of the Pacific Products Corporation? A. Yes.

Q. And Pacific Products Corporation was a corporation duly authorized to do business under the laws of the State of California? A. Yes, sir.

Q. And has its principal place of business in the City and County of San Francisco?

(Testimony of Joseph Goldie.)

A. Yes.

Q. Prior to September 29, 1937, you had certain transactions with Herbert Fleishhacker, did you not? A. Yes, sir.

Q. And on or about September 29, 1937 you entered into a written agreement with Mr. Fleishhacker? A. Yes, sir.

Q. I show you a document here purporting to be an agreement, dated September 29, 1937, and call your attention to the last page thereof and ask you if that is your signature? A. Yes, sir.

Q. Is that the signature of Herbert Fleishhacker? A. I think so, yes, sir.

Q. Well, are you sure? A. Yes.

Q. That was signed in your presence?

A. I think so.

Mr. Glicksberg: I offer it in evidence, if your Honor please.

Mr. Stark: To which I object, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial on the question of jurisdiction and the whereabouts and location of this property on the date of the filing of Mr. Fleishhacker's petition.

The Referee: The objection may be overruled. Admitted strictly on the question of jurisdiction.

RECEIVER'S EXHIBIT NO. 1.

[Printer's Note]: Receiver's Exhibit No. 1 will be found set forth at pp. 8 to 12 of this printed transcript of record.

(Testimony of Joseph Goldie.)

Mr. Stark: Pardon me, your Honor, I am under the impression that it is not necessary for me to save exceptions.

The Referee: Isn't there some question as to that under the [27] Ninth Circuit's rulings?

Mr. Stark: There may be some question and I respectfully except to your Honor's ruling.

The Referee: Very well.

Mr. Glicksberg: Q. Mr. Goldie, when you executed Receiver's Exhibit No. 1, you also received a duplicate for your own file, did you not?

The Witness: A. Yes, sir.

Q. Mr. Goldie, have you referred to that agreement recently?

A. I think I have; my attorney has.

Q. You also have referred to it, too, have you not? A. He has the copy; I have not.

Q. Under that agreement Mr. Fleishhacker was entitled to 3,000 shares of Rainier Brewing stock, class A?

Mr. Stark: Just a minute, please. We object to that on the ground that the contract speaks for itself. It is in evidence and an interpretation by Mr. Goldie would serve no useful purpose.

Mr. Glicksberg: No interpretation; I am just asking the witness.

The Referee: I think the objection is good, Mr. Glicksberg.

Mr. Glicksberg: Q. Mr. Goldie, at the time when you executed this agreement, you were the owner of

(Testimony of Joseph Goldie.)

1,924.4 shares of class A, 7 per cent cumulative preferred stock of Pacific Products, Inc.?

The Witness: A. I believe so, yes.

Q. Did you at any time deliver to Herbert Fleishhacker 539 shares of Pacific Products, Inc., a corporation, class A, 7 per cent cumulative stock?

A. No, sir.

Q. As per the terms of this agreement?

A. No, sir.

Q. At no time have you delivered said stock since September 29, 1937, to the present time?

A. No, sir. [28]

Q. Since September 29, 1937, did you deliver any dividends to Mr. Fleishhacker?

A. I believe I did.

Q. And when? A. I haven't the dates.

Mr. Stark: Did you say since?

Mr. Glicksberg: Yes.

Mr. Stark: In order to save the Court's time, I am willing to stipulate that only one delivery of money has been made by Mr. Goldie following the date of the contract, to Mr. Fleishhacker, which delivery was the sum of \$1,800. on September 20, 1938.

Mr. Glicksberg: Q. That sum of \$1,800 was delivered on account of dividends due to Mr. Fleishhacker?

The Witness: A. Yes, sir.

Q. Mr. Goldie, on the 3,000 shares of Rainier Brewing Company class A stock set forth in the agreement you received from the Rainier Corpora-

(Testimony of Joseph Goldie.)

tion on October 21, 1937, \$1.30 per share dividend, did you not?

A. I believe we did. I am not sure, but I think we did.

Q. November 20, 1937, you received a further dividend of 15 cents on the Rainier class A stock?

A. I think so.

Q. September 16, 1938, you received 60 cents a share dividend, which evidently has been paid by this \$1,800 you testified to? A. Yes.

Q. On October 24, 1938, a further dividend was declared and paid by Rainier Brewing Company in the sum of \$1.15? A. Yes.

Q. On each and every one of the class A Rainier shares? A. I think so.

Q. On December 29, 1938, the Rainier Brewing Company further declared an additional dividend of 60 cents, which was payable at the rate of 20 cents per share on the 10th of January, 1939, the 10th of February, 1939, and the 10th of March, 1939? [29]

A. That is correct.

Q. All of those dividends were received by you?

A. Yes.

Q. And all the dividends were also received by you of the 3,000 shares of stock due to Mr. Herbert Fleishhacker? A. Yes.

Q. No payments on dividends have been paid to Herbert Fleishhacker except that \$1,800?

A. That is correct.

(Testimony of Joseph Goldie.)

Mr. Stark: Just a moment, please. We move, your Honor, for the exclusion of the words, "3,000 shares due Herbert Fleishhacker", as assuming something not in evidence and ask that it go out. That is the very controversy.

The Referee: Doesn't the contract provide it?

Mr. Glicksberg: Yes, your Honor, the contract in the first paragraph.

The Referee: The motion will be denied.

Mr. Stark: Exception.

Mr. Glicksberg: Q. Did you at any time between the 29th of September, 1937, and the present date inform Mr. Fleishhacker that you were indebted to Mr. Fleishhacker for the dividends set forth?

The Witness: A. I believe so.

Q. And when was that?

A. I cannot tell you the exact time or date.

Mr. Stark: You mean, pardon me, an oral statement of Mr. Goldie or a written statement?

Mr. Glicksberg: Any form of statement, oral or written.

The Witness: A. Well, we talked about it, yes.

Mr. Glicksberg: Q. And when did you talk about it?

A. I cannot give you the exact date.

Q. Did you ever give Mr. Fleishhacker any written statement? A. Not to my knowledge.

Q. At any time did you tell Mr. Fleishhacker that he was not [30] entitled to these dividends?

(Testimony of Joseph Goldie.)

A. I don't recall making a statement of that kind to him.

Q. Is there any reason why these dividends have not been paid to Mr. Fleishhacker?

A. Yes, there are reasons why.

Q. What is the reason?

A. The reason was that there has been a continual discussion between Mr. Fleishhacker and I as to that contract from the time that we first agreed that I was to deliver to him the security of the Pacific Products, which went out of existence and the bank who held my stock at the time refused to deliver the Pacific Products stock to Mr. Fleishhacker or the 3,000 shares.

Q. May I repeat the question, Mr. Goldie: Did you at any time have any discussion with Mr. Fleishhacker referring to the question of dividends, your failure to make payment?

A. Yes, we talked about it every time a dividend was paid.

Q. You mean you talked to Mr. Fleishhacker about October 21, 1937, about the dividend?

A. I don't remember the date exactly when I talked to him, but I presume every time there was a dividend, we talked to each other about it.

Q. Did you at any time in these conversations tell Mr. Fleishhacker that you were not going to pay those dividends to Mr. Fleishhacker?

A. No, no.

(Testimony of Joseph Goldie.)

Q. Is it not a fact that every time you have affirmed your intention to make these payments to Mr. Fleishhacker? A. Yes, sir.

Q. Is it not also a matter of fact that you communicated with Mr. Fleishhacker and told him that you were indebted to Mr. Fleishhacker for these various dividend payments to you?

Mr. Stark: Just a minute. Are you referring to a written communication now, Mr. Glicksberg?
[31]

Mr. Glicksberg: I am asking; that is up to the witness.

The Witness: A. I don't believe there ever was any written communication; it was all verbal.

Q. All verbal? A. Yes.

Q. Are you positive about it?

A. That is my recollection. I feel that I never corresponded with Mr. Fleishhacker on that. I don't recall any correspondence on the dividends.

Q. Do you recall any conversation had with Mr. Fleishhacker when you gave him this \$1,800 check?

A. I do not.

Q. Do you recall ever writing Mr. Fleishhacker when you gave him this \$1,800 check?

A. No, sir.

Q. Is it then your testimony at the present time that you did not affirm these dividends in writing?

Mr. Stark: Just a moment, please. I submit, if your Honor please, that if Mr. Glicksberg has

(Testimony of Joseph Goldie.)

any writing with regard to this question, *which has* been interrogating the witness on, that the witness is entitled to see this writing.

The Referee: This is cross examination at this time.

Mr. Stark: The rule remains the same, I think, your Honor.

The Referee: No, he has a right to lay the foundation to impeach the witness on cross examination.

Mr. Stark: Do I understand that your Honor overrules the objection?

The Referee: The objection is overruled.

Mr. Stark: May I have an exception?

The Referee: Yes.

Mr. Glicksberg: Will the reporter read the question, please?

(Question read.)

Mr. Stark: You are only required to search your memory, Mr. Goldie. [32]

The Witness: A. I have no recollection whether there was any correspondence. I don't remember it.

Mr. Glicksberg: Q. From your recollection at the present time, Mr. Fleishhacker is entitled to all of the dividends to which you have testified, which total, I think—we can stipulate if Mr. Stark will stipulate, the sum of \$11,400, less the sum of \$1,800 that you have paid him?

Mr. Stark: To that, if your Honor please, we object on the ground that it is an assumption of

(Testimony of Joseph Goldie.)

something not in evidence. It is the very meat of this very controversy and calls for the opinion and conclusion of the witness.

Mr. Glicksberg: I submit, if your Honor please, the witness has testified that these dividends were due to Herbert Fleishhacker and he at no time has denied they were due to Mr. Fleishhacker and he has also testified he has received each and every one of the dividends.

The Referee: Well, isn't that a matter of mathematical conclusion?

Mr. Glicksberg: That is correct.

The Referee: It would be his conclusion if he testified to it.

Mr. Glicksberg: Well, I don't know if it would be a conclusion. We all have to reach a conclusion in mathematics.

The Referee: There is a way of proving that, Mr. Glicksberg. I think the objection is good.

Mr. Glicksberg: Q. Mr. Goldie, is it not a matter of fact that on about the 16th of September, 1938, when you made the payment to Mr. Fleishhacker of \$1,800, that you affirmed in writing all of the prior dividends that were due to Mr. Fleishhacker under the terms of this contract? [33]

The Witness: A. I don't remember that. I don't remember.

Mr. Stark: I am familiar with that letter.

Mr. Glicksberg: Q. I show you here an instru-

(Testimony of Joseph Goldie.)

ment purporting to be a letter dated September 20, 1938, and ask you whether that is signed by you?

Mr. Stark: We will stipulate that is Mr. Goldie's signature.

Mr. Glicksberg: Perhaps the witness would like to refresh his memory, Mr. Stark.

The Witness: A. I remember that now.

Q. Did you send that letter to Mr. Fleishhacker?

A. Yes.

Q. Was that letter sent when you forwarded the \$1,800 check? A. I believe so.

Mr. Glicksberg: We offer it in evidence, if your Honor please.

Mr. Stark: To which, if your Honor please, we object on the ground that it is incompetent, irrelevant, and immaterial. I point out it refers to the existence of a debt between Mr. Goldie and Mr. Fleishhacker and this Court has no jurisdiction to collect accounts receivable due the receiver.

Mr. Glicksberg: Under the law I think counsel is in error, where the debt has been established.

The Referee: What about the Orinoco Mine case? The objection may be overruled.

Mr. Stark: May I have an exception, your Honor?

The Referee: Yes.

(Testimony of Joseph Goldie.)

RECEIVER'S EXHIBIT NO. 2

San Francisco, California

September 20, 1938

Mr. Herbert Fleishhacker,
No. 1 Sansome Street
San Francisco, California

Dear H. F.:

Herewith my check for \$1800.00 to cover the 60c per share dividend just paid by Rainier Brewing Company on the 3000 shares of "A" stock due you from me.

I still owe you dividends paid last year on this stock amounting to \$4350.00, less \$1394.94 due me, leaving a balance due you of \$2955.06 which I will pay you at a later date.

Yours very truly,

JOSEPH GOLDIE [66]

Mr. Glicksberg: Q. Mr. Goldie, referring to Receiver's Exhibit No. 2, I will ask you to state to this Court how you arrived at \$4,350, which you claim under this letter was still due Herbert Fleishhacker as dividends paid for the last year?

The Witness: A. Well, I suppose that was taken off the amount of dividends that had been declared. That is, an amount [34] that is due me which came to \$4,350.

Q. You mean the amount that you had received

(Testimony of Joseph Goldie.)

on these 3,000 shares of stock? A. Yes, sir.

Q. That amount, for the purpose of calculation, was the dividend of October 21, 1937, at \$1.30 per share, a further dividend of November 20th at 15 cents per share, which would calculate to the \$4,350. that you set forth in the letter that you are indebted to Herbert Fleishhacker? A. Yes.

Q. Have you any recollection of a further communication with Mr. Herbert Fleishhacker with reference to the other dividends?

A. I have not.

Q. Those dividends that you owed were due to Herbert Fleishhacker and were due in accordance with the terms of that contract?

A. I presume so.

Q. Those were the only rights Mr. Fleishhacker had against you? A. Yes.

Q. Mr. Goldie, did you at any time, in accordance with the terms of that contract, attempt to deliver to Mr. Fleishhacker the 539 shares of Pacific Products, Inc. class A 7 per cent stock?

A. Well, I signed the contract to have the bank and the bank refused to deliver them.

Q. Where is that contract?

Mr. Stark: Receiver's Exhibit A, Mr. Glicksberg.

Mr. Glicksberg: Q Are you referring to Receiver's Exhibit A as the contract?

The Referee: That is Receiver's Exhibit No. 1.

Mr. Stark: I mean No. 1.

(Testimony of Joseph Goldie.)

Mr. Glicksberg: Q. Is that the contract you are referring to?

The Witness: A. I think it is. That has in it, hasn't it, the Pacific Products? [35]

Mr. Glicksberg: I don't know. I suggest that you read it. I have no objection.

Mr. Stark: Mr. Glicksberg, page 2 of the contract, Receiver's Exhibit No. 1, reads as follows: "Now, therefore, this agreement witnesseth: That the parties hereto", Mr. Fleishhacker and Mr. Goldie, "shall forthwith, and upon the execution of this agreement, cause to be delivered to the transfer agent of Pacific Products, Inc., a corporation, the stock certificate now standing in the name of Joseph Goldie, representing his ownership of 1,924 - 4/10ths shares of Pacific Products, Inc., a corporation, Class A 7 per cent cumulative preferred stock, with directions to said transfer agent and company to split said certificate into one certificate of 539 shares and one certificate of 1,385 - 4/10th shares each of said certificates as split, to be reissued by said company and said transfer agent in the name of Joseph Goldie."

I call your attention to the fact that it becomes an obligation of the parties to the contract to cause that to be issued.

Mr. Glicksberg: That is your interpretation. In other words, when you said "parties" you assumed the word, first party and second party.

Mr. Stark: Mr. Goldie and Mr. Fleishhacker are the only parties to the contract.

(Testimony of Joseph Goldie.)

Mr. Glicksberg: Yes. But there is nothing in this contract that puts the duty upon Mr. Fleishhacker to do anything.

Mr. Stark: There is not?

Mr. Glicksberg: No.

Mr. Glicksberg: Q. Now, Mr. Goldie, are you familiar with this contract?

The Witness: A. Yes, sir.

Q. Or would you like to refresh your memory?
[36]

A. Well, I would like to refresh my memory. I only read it once, at the time I signed it.

Q. You read it the last time you were in Court?

A. I looked at it. I did not read it all.

Mr. Young: If the Court please, while Mr. Goldie is looking at the contract, I wanted to clear this situation: On several occasions when this proceeding has been before your Honor, the newspaper people have committed quite an error to the effect that this was a proceeding to recover assets from Mr. Fleishhacker. The impression given was that Mr. Fleishhacker had concealed assets and the Court was proceeding to attempt to recover those assets. Counsel will agree with me that there is no such proceeding pending, that it is merely a proceeding against Mr. Goldie and does not concern assets to be recovered.

Mr. Glicksberg: In fact, this asset has been declared by Mr. Fleishhacker.

(Testimony of Joseph Goldie.)

Mr. Young: I hope the newspaper people here will get that clearly in mind at this time. Thank you, your Honor.

The Referee: Very well.

The Referee: Q. Have you read the contract?

The Witness: A. Yes.

Mr. Glicksberg: Q. Now, Mr. Goldie, have you, pursuant to that contract, ever authorized Pacific Products, Inc., a corporation, the transfer agent, to split that certificate of 1,924.4 shares of Pacific Products, Inc. into two certificates?

A. I believe I did.

Q. And when?

A. I cannot tell the exact dates.

Q. Well, approximately when?

A. Just about the time, right after we entered into this agreement.

Q. And to whom did you give this order? [37]

A. Well, I handed it, I believe, to Mr. Fleishhacker. He in turn handed it over to the secretary of Pacific Products, I presume.

Q. Have you a copy of the order?

A. I have not.

Q. Have you any memorandum at all?

A. I have not.

Q. Can you refresh your memory as to the contents of the order?

A. No, sir. I have no recollection, but I remember that when I entered into an agreement with Mr. Fleishhacker that I gave him some sort of a

(Testimony of Joseph Goldie.)

paper to present to the secretary of Pacific Products.

Q. As a matter of fact, Mr. Goldie, may that not be confused with some of your prior dealings with Mr. Fleishhacker?

A. No, no, it is just right in connection with this deal. I don't know whether you are fully aware of the fact that in November, 1937, the Pacific Products was merged.

Q. That is right.

A. You have the record, have you?

Q. That is right. As a matter of fact, the memorandum you refer to was about 1935 or 1936, along in there, before this agreement actually was entered into?

A. The Pacific Products stock I know was cancelled right at the merger.

Q. That is right. All I am asking you, Mr. Goldie, is if you can give us any recollection with reference to this order you testified you purportedly gave Mr. Fleishhacker about the time this contract was executed?

A. I don't remember.

Q. Well, as a matter of fact, you did not give him any order at this time? Any order you had given him was prior to that time, about 1935 or 1936?

A. Possibly so.

Q. And then also as a matter of fact after the contract was executed, you did nothing about attempting to transfer this Pacific Products stock to Mr. Fleishhacker?

(Testimony of Joseph Goldie.)

A. I could not, there was no way of doing it.

[38]

Q. In other words, you know of no way you could do it? A. No, I did not.

Q. You neither gave any order to Pacific Products transfer agent or any one else to have this stock cancelled and divided into two certificates?

A. I know it could not be done. The bank would not permit it. They held all my Pacific Products stock, which they do up to this day, not Pacific but the Rainier.

Q. You knew it could not be done, therefore you did not attempt to do it? A. Correct.

Q. Also, you did not attempt to secure for Mr. Fleishhacker 539 shares of Pacific Products class A stock from any other source?

A. It wouldn't have done me no good. How could I?

Q. I don't know. There was additional Pacific Products stock? A. In my name?

Q. Which you could have purchased?

A. No. There was not a share of Pacific Products at any time I know of that could be purchased.

Q. You did not know where there was sufficient Pacific Products class A stock outstanding other than the stock the bank held on your account?

A. I did not know it if it was.

Q. In other words, you did not hold all the stock of Pacific Products? A. No, sir.

(Testimony of Joseph Goldie.)

Q. There was a total amount issued of at least five or six times in excess of the amount you had?

A. Just about that. I had about 19 or 20 per cent.

Q. You did not attempt to make any arrangement with the bank to pay off a portion of your obligation to have this stock delivered to Mr. Fleishacker, did you? A. No, sir.

Q. You could not do that, either?

A. No, sir.

Q. In other words, financially you were not in position to [39] do it? A. Correct.

Q. Notwithstanding your obligation under the terms of this contract? A. Yes, sir.

Mr. Glicksberg: No further questions.

The Referee: Cross examine?

Mr. Stark: No cross examination, reserving the right, however, to call Mr. Goldie as my own witness.

The Referee: Very well.

Mr. Glicksberg: The petitioner rests on the question of the jurisdiction.

Petitioner Rests.

Mr. Stark: Then, Mr. Goldie, you can resume the stand.

JOSEPH GOLDIE

recalled for the Respondent:

Mr. Stark: I move, your Honor, for an order holding that it is apparent on the face of the record

(Testimony of Joseph Goldie.)

that your Honor has not jurisdiction over Mr. Goldie to determine this controversy between Mr. Goldie and the receiver.

The Referee: The motion is denied.

Mr. Stark: May I have an exception?

The Referee: Granted.

Mr. Stark: Q. Mr. Goldie, at the time of the making of the contract, Receiver's Exhibit No. 1, dated September 29, 1937, who had possession of the 1,924.4 shares of the class A preferred stock of Pacific Products?

Mr. Glicksberg: For the record, if your Honor please, we are going to object to that as entirely incompetent, irrelevant and immaterial and an attempt to vary the terms of a written instrument. The contract itself speaks for itself.

Mr. Stark: The contract does not say that Mr. Goldie had [40] possession of it.

Mr. Glicksberg: We are bound by the terms of the contract. It is an attempt to incorporate in the terms of the contract a prior oral arrangement that may have been had between the parties, which we maintain was subsequently merged in the written instrument.

Mr. Stark: Will your Honor let the reporter read the question back?

The Referee: Proceed.

(Question read.)

(Testimony of Joseph Goldie.)

Mr. Stark: Now, your Honor, the contract does not state that either Mr. Fleishhacker or Mr. Goldie has possession of the stock.

Mr. Glicksberg: That is correct. The point we are making is that it is entirely incompetent, irrelevant and immaterial who has possession of the stock. So far as we are concerned, Mr. Goldie has entered a written instrument to deliver a certain number of shares of stock out of a certificate of 1,924, and has a collateral obligation there to perform and any oral arrangement there may be or any intention of Mr. Goldie which he may have had as to where he would secure that 1,924 shares of stock, we maintain is incompetent, irrelevant and immaterial in view of the written contract.

Mr. Stark: Your Honor, the whereabouts of the stock, not only at the time of the making of the contract, but at the time of the filing of the petition by Mr. Fleishhacker in this proceeding, is in my opinion, and I earnestly urge it, the utter criteria of the very question before your Honor.

The Referee: You mean the possession of the stock or the possession of the money?

Mr. Stark: Either or both.

The Referee: The objection may be sustained as to the possession of the stock. [41]

I suppose you want an exception?

Mr. Stark: Yes, Your Honor.

Mr. Stark: Q. Following the date of this contract, did you receive any word from Mr. Fleish-

(Testimony of Joseph Goldie.)

hacker that he was unable to get the stock of the Pacific Products released from the lien of the pledge of the Anglo Bank?

Mr. Glicksberg: One minute. The same objections, Your Honor, it is incompetent, irrelevant and immaterial and not within the issues of the case and an attempt to incorporate in the terms of the written instrument conversation after the execution of the written instrument.

The Referee: Sustained.

Mr. Stark: Exception. May I make an offer of proof in regard to those two questions, Your Honor?

The Referee: Surely.

Mr. Stark: The purpose of the questions, and the respondent will prove, that on the date of the making of the contract that it is asserted gave rise to these rights, all of the stock of Pacific Products, Inc., owned by Mr. Goldie was pledged to the Anglo Bank and the stock was in the possession of the Anglo Bank on the date of the making of the contract and was also in the possession of the bank subject to the lien of their pledge on the date of the filing of the proceeding in this Court by Mr. Fleishacker. We offer to prove that.

The Referee: Very well.

Mr. Stark: Q. Mr. Goldie, referring to the letter of September 20, 1938, the Receiver's Exhibit No. 2, calling your attention to the second paragraph which states: "I still owe you dividends paid last

(Testimony of Joseph Goldie.)

year on this stock, amounting to \$4,350, less \$1,394.94 due me, leaving a balance due you of \$2,955.06, which I will pay [42] you at a later date."

That figure, \$1,394.94, what does it refer to?

The Witness: A. Money due me from Herbert Fleishhacker.

Q. That is a claimed obligation due from Mr. Fleishhacker at that time? A. Yes, sir.

Q. On the date of the filing of the proceeding in the Court by Mr. Fleishhacker had that money been paid to you by Mr. Fleishhacker? A. No, sir.

Q. Has that money been paid to you by the receiver since the filing of the proceeding?

A. No, sir.

Mr. Stark: That is all from Mr. Goldie.

The Referee: Very well.

Cross Examination

Mr. Glicksberg: Q. Mr. Goldie, with reference to this offset of \$1,394.94, what was that due to you from Mr. Fleishhacker for?

A. That was due me in a settlement for some cash money that he owed to the Edward J. Goldie Importation Company, which I took over.

Q. When was this settlement had?

A. That was just part of it and the other was something else. I don't recall, \$275. or \$300. I haven't the other item. This went back as far as 1933 or 1934 that he owed that for.

Q. Mr. Goldie, is it not a matter of fact that the \$1,119.94 of this purported claimed offset of yours

(Testimony of Joseph Goldie.)

was a debt due by Herbert Fleishhacker to the Edward J. Goldie Importation Company?

A. That is just what I said.

Q. And the Edward J. Goldie Importation Company is a corporation, or was a corporation at that time?

A. Yes, sir.

Q. And still is a corporation?

A. No, it went out of business. [43]

Q. When was it dissolved?

A. It went out, I think, in the fall of 1934 or the spring of 1935, I believe. I don't just remember the exact date.

Q. 1934 or 1935?

A. I think it went out in 1935.

Q. Didn't the Edward J. Goldie Importation Company do business still in 1936?

A. No, sir, I don't think so.

Q. Mr. Goldie, I show you this purported statement from the Edward J. Goldie Importation Company to H. F. Fleishhacker, evidencing thereupon certain items of a previous balance.

A. This was a statement, I presume, after they had closed up.

Q. Well, just look at it, Mr. Goldie. Just read it, because I don't want to question you on it and take advantage of you. You notice there considerable purchased made by Herbert Fleishhacker from the Edward J. Goldie Importation Company during the year of 1936?

A. Yes, I notice that.

Q. And you also notice that this statement calls for a total amount of \$1,119.94?

(Testimony of Joseph Goldie.)

A. I know we made a settlement. It was agreed upon that he would pay that at the time that I wrote him that memorandum. When we settled that very memorandum you looked over here, he agreed to it, so did I, that that should be deducted.

Q. Have you any memorandum to that effect in writing? A. Only what you have there.

Q. What?

Mr. Stark: Exhibit 2.

Mr. Glicksberg: Q. This?

The Witness: A. Yes.

Q. Did Mr. Fleishhacker ever sign that?

A. I don't think so.

Mr. Stark: It must be apparent that Mr. Fleishhacker has not [44] placed his name on the document. All you have to do is to look at it.

Mr. Glicksberg: It must be apparent?

Mr. Stark: That his name is not on there. Why ask this witness a ridiculous question like that?

Mr. Glicksberg: Ridiculous questions count. I have a right to, Mr. Stark, under cross examination. The witness can refer to the exhibit.

Mr. Stark: I know these colloquies between counsel are meaningless to you, Your Honor. It must be patent that it is not there.

The Referee: Why continue it, Mr. Stark, when you know it is meaningless?

Mr. Glicksberg: Q. Mr. Goldie, going back to the purported offset which you claim, the \$1,194.94 is an obligation of Herbert Fleishhacker to the Ed-

(Testimony of Joseph Goldie.)

ward J. Goldie Importation Company, a corporation?

The Witness: A. It was an obligation to myself.

Q. Well, have you any assignment of the obligation from the corporation?

A. It is not necessary. It was our business. We owned, it belonged to my family.

Q. That is right, but it still was a corporation?

A. Yes, sir.

Q. At all times it has been conducted as a corporation? A. Yes, sir.

Q. You individually are only one of the stockholders of the corporation?

A. The controlling.

Q. You have control of the corporation, but still you are only one of the stockholders?

A. Yes, sir.

Q. At no time have you had an assignment from the Edward J. [45] Goldie Importation Company of the claim which the Edward J. Goldie Importation Company had against Herbert Fleishhacker?

A. No, sir.

Mr. Glicksberg: No further questions.

Redirect Examination

Mr. Stark: Wait a minute.

Q. Your son, Edward J. Goldie, was president of the Edward J. Goldie Importation Company?

A. Yes, sir.

(Testimony of Joseph Goldie.)

Q. This obligation of the \$1,119.94 covered sales by the Edward J. Goldie Importation Company to Mr. Fleishhacker? A. Yes, sir.

Q. And the Edward J. Goldie Importation Company went out of business, did it not?

A. Yes, sir.

Q. Aren't you mistaken about the date it went out of business?

A. Possibly I am. I thought it was much before the time this shows.

Q. I handled the transaction? A. Yes.

Q. In regard to the sale of the assets of that corporation, did I not? A. Yes, sir.

Mr. Stark: If I tell you, Mr. Glicksberg, that the transfer of all the physical assets of the Edward J. Goldie Importation Company took place in June of 1936, would you accept that to be the fact?

Mr. Glicksberg: My associate suggests, Mr. Stark, that we have no objections to stipulating to your statement that the corporation went out of business on that particular date. As to what happened to the physical assets, we would not want to stipulate.

Mr. Stark: All right. I simply wanted to clear up the minor feature in the testimony of Mr. Goldie that it went out of business in 1935. It was June, 1936, and I believe the disposition of the [46] assets was to a firm known as the Distillers' Distributing Co.

(Testimony of Joseph Goldie.)

Q. Did you have a discussion with your son, Eddie, the president of the Edward J. Goldie Importation Company, with regard to this \$1,394.94 owing by Mr. Fleishhacker to the Edward J. Goldie Importation Company?

The Witness: A. Yes.

Q. Did you ever discuss the matter of the \$1,394.94 owing from Mr. Fleishhacker to the Goldie Importation Company with Mr. Fleishhacker?

A. On one or two occasions.

Q. What was the substance of the conversation?

Mr. Glicksberg: We object to that on the ground that no proper foundation is laid as to time and place.

The Referee: Lay the foundation, Mr. Stark.

Mr. Stark: I will go a little further.

Q. Do you recall approximately when the one or two conversations took place?

The Witness: A. I do not.

Q. Can you fix it within a year or can you fix it in relation to the date of your letter of September 20, 1938, to Mr. Fleishhacker?

A. It must have been just two or three months prior to that time, that I sent that letter, that I first spoke to him about it.

Q. Where did the conversation take place?

A. In his office in the bank.

Q. What was the conversation?

Mr. Glicksberg: We are going to object to that on the ground that no proper foundation is laid as yet. The witness testified it must have been.

(Testimony of Joseph Goldie.)

Mr. Stark: Q. Give your nearest recollection, Mr. Goldie, as to the date of the conversation? [47]

The Witness: A. I would say two or three months before, Mr. Stark.

Q. September 20, 1938?

A. The date of the letter, yes.

Mr. Stark: Is that satisfactory, to have the date at that time?

Mr. Glicksberg: Go ahead.

Mr. Stark: Q. Now, I will repeat the question, what was the conversation?

The Witness: A. Well, I called his attention to the amount due the Edward J. Goldie Importation Company.

Q. Yes?

A. And on that occasion and one other occasion, just two occasions, I brought that up to him.

Q. What did he say to you, if anything, as to how that would be disposed of?

Mr. Glicksberg: I am going to object to leading and suggestive questions. I don't object to the conversation, but do object to Mr. Stark's leading the witness.

Mr. Stark: All right. Will Your Honor rule?

The Referee: Read the question.

(Question read.)

The Referee: I think it is leading, Mr. Stark. Ask for the conversation.

Mr. Stark: Q. Did you have any conversation on the date you have spoken of or approximately at that time in regard to the \$1,394?

(Testimony of Joseph Goldie.)

The Witness: A. It was agreed with him that I deduct from that——

Mr. Glicksberg: We are going to object to that.

The Witness: A. From that——

Mr. Glicksberg: Wait a minute. [48]

Mr. Stark: Just what you said and he said. The substance.

The Witness: A. He said, "Take that off the dividends".

Mr. Stark: You did not offer this in evidence, did you?

Mr. Glicksberg: No, I will.

Mr. Stark: Will you offer it first?

Mr. Glicksberg: May I offer this in evidence?

RECEIVER'S EXHIBIT No. 3

(Letterhead)

RAINIER BREWING COMPANY, INC.

San Francisco, California

December 31, 1937

Mr. E. Mitchell,
#1 Sansome Street,
San Francisco, California,

Dear Eddie:

Enclosed, herewith, is the statement you requested.

Very truly yours,

(Signed) EDWARD GOLDIE

Encl. (1) EM [67]

(Testimony of Joseph Goldie.)

Statement

EDWARD J. GOLDIE IMPORTATION CO.

560 Ninth Street

San Francisco

Underhill 4811

H. F. Fleishhacker

#1 Sansome Street,

San Francisco, California,

Detach this portion and

mail with your check

Amount Remitted—

Date 1935	Description	Debit	Credit	Pay Last Amount in This Column
Previous Balance				
Oct.				\$1,134.90
26	Cash		\$350.00	784.90
Nov.				
7	04286	\$40.60		825.50
Dec.				
3	06631	14.32		839.82
14	07625	31.33		871.15
17	07830	42.66		913.81
23	08484	62.67		976.48
24	08518	39.06		
	08693	58.71		1,074.25
1936				
April				
10	Cash		300.00	774.25
13	10810	201.90		
May				
20	11189	143.79		1,119.94

Statement from Edward J. Goldie
Importation Co.

Paid..... 19..... Check No.....

(Testimony of Joseph Goldie.)

The Referee: That is the statement, for the record, rendered to H. F. Fleishhacker, No. 1 Sansome Street, San Francisco, California.

Mr. Glicksberg: The statement was attached to that letter. We except the portion in writing underneath.

Mr. Stark: You will agree that the portion on the letterhead of the Rainier Brewing Company can go in, won't you?

Mr. Glicksberg: That is correct. The pencil notation is not a part of it.

Mr. Stark: Q. There is a variance in the amount of the statement, \$1,119.94 and the amount referred to in the letter of September 20 as being \$1,394.94, of \$280. Do you know what that \$280 represented?

The Witness: A. That was a cash item. I cannot recall what that was due for, but he admitted it at the time that it was due to me.

Q. Some money he owed you?

A. Money coming to me from him; what for, I cannot recall at this time.

Q. You discussed the matter of the \$1,119.94?

A. Yes.

Q. And the \$280 to make up the total in the letter of September 20?

A. Yes, that is right, that is correct.

Mr. Stark: That is all from Mr. Goldie.

(Testimony of Joseph Goldie.)

Recross Examination

Mr. Glicksberg: Except this further question on recross. [49]

Q. Irrespective of your conversation with Mr. Fleishhacker, at the time you had that conversation with Mr. Fleishhacker, this \$1,119.94 was due to the Edward J. Goldie Importation Company, a corporation?

A. Well, I considered it was due to me.

Q. I appreciate that, but so far as the record?

A. He agreed it was due me, too.

Q. He agreed? A. Yes.

Q. What did he say?

A. Well, the fact that he agreed to have it deducted off the amount. He accepted that letter.

Q. Which letter? Did you pay him anything with reference to the memorandum about the \$4,350? A. Yes, sir.

Q. You did not make a payment on that account? A. I wrote that and he accepted it.

Q. He accepted the letter?

A. It was accepted by him.

Q. At that time you had no title?

A. He agreed absolutely to those figures.

Q. That he owed the Goldie Importation Company \$1,194.94?

A. And was willing to give me the credit for it because he felt it was my money, it was due Joe Goldie.

(Testimony of Joseph Goldie.)

Q. Did you ever give him a bill paid in full from the Edward J. Goldie Importation Company?

A. I don't remember. Chances are I did.

Q. Do you remember whether the Edward J. Goldie Company has ever given him a bill paying the obligation in full? A. I cannot tell that.

Q. At the time you made the arrangement with Mr. Fleishhacker, Mr. Goldie, the money was due to the corporation?

Mr. Stark: Due to whom?

Mr. Glicksberg: Due to the Goldie Importation Company, a corporation, from Mr. Fleishhacker.

[50]

Mr. Stark: I submit that is absolutely contrary to what the witness testified.

Mr. Glicksberg: We will submit the question.

The Referee: He may answer. It is cross examination.

(Question read.)

The Witness: A. Well, I again state I considered it was due to me.

Mr. Glicksberg: Q. You considered it?

A. Yes, and so did he.

Q. But you never received an assignment from the corporation? A. No, no.

Q. You never saw to it that the corporation cancelled the obligation of Mr. Fleishhacker?

A. That figure was cancelled on the books.

Q. Well, when?

A. At the time I took it over.

(Testimony of Joseph Goldie.)

Q. Did you cause the obligation to be cancelled?

A. Off the books; I think it was.

Q. Are you certain about it?

A. Pretty sure.

Mr. Stark: You see, Mr. Goldie was not the bookkeeper for the Edward J. Goldie Importation Company. As a matter of fact, I don't think he was an officer of the company.

The Witness: No, no.

Mr. Stark: Although his family and he himself did own all the stock of the company.

The Witness: That is right.

Mr. Glicksberg: No further questions.

(Witness excused.)

LEON SLOSS

called for the Respondent, sworn.

Mr. Stark: Q. Where do you reside, Mr. Sloss?
[51]

A. 2700 Broadway, San Francisco.

Q. You are connected with the Anglo California National Bank? A. Yes.

Q. What is your position there, Mr. Sloss?

A. Vice President.

Q. In charge of what?

A. Collateral loans and keeping of collateral records, things of that nature.

(Testimony of Leon Sloss.)

Q. Has the Anglo California National Bank an account with Mr. Joseph Goldie?

Mr. Glicksberg: I am going to object to that, if Your Honor please, as entirely irrelevant, incompetent and immaterial and not within the issues of this case.

The Referee: What is the materiality?

Mr. Stark: I am going to show, and to save time, if Your Honor please, I will offer to show at this time, that the loan records of the Anglo California National Bank will disclose that since 1933 at least, long prior to the transaction in regard to this contract, that all of the stock issued in Mr. Goldie's name in Pacific Products was on deposit with the Anglo California National Bank in pledge to secure a loan that ranged through a figure of approximately \$165,000, if I remember, down to the present balance of some \$65,000; and, further, at no time has Mr. Goldie has any possession of any of this stock; at no time has Mr. Fleishhacker had possession of this stock. And, following the making of the contract, both Mr. Goldie and Mr. Fleishhacker, pursuant to the terms of it, sought to persuade the bank to release a portion of the Pacific Products stock and consequently a portion of the Rainier Brewing Company A stock in compliance with the conditions of the contract that that be done, and the bank refused to do it. [52]

Mr. Glicksberg: To which attempted introduction we object as entirely incompetent, irrelevant

and immaterial and an attempt to change the terms of a written instrument and it is not an act which is impossible of performance. Under the terms of the contract it is a collateral obligation and we are not concerned with the rights of these parties, whether it might have been a hardship or not on Mr. Goldie to perform. This is this particular contract.

Mr. Stark: I think perhaps, Your Honor, Mr. Glicksberg has misconstrued the purpose of the offer. The contract, if Your Honor will notice, is that the parties to the contract will perform the mechanics in regard to the delivery of the stock to the transfer agent of the company and have it re-issued to split off these shares Mr. Fleishhacker was supposed to get under the contract. I wish to show by this testimony that an effort to do that was made on the part of Mr. Fleishhacker and Mr. Goldie, and the bank refused, being a third party not designated in the contract, to do that act of mechanics.

Mr. Glicksberg: I am going to object, if Your Honor please, on the ground that it is entirely incompetent, irrelevant and immaterial to the issues of the case at the present time. Mr. Stark has twice made the assertion that the use of the word "parties" in the particular contract included both. We maintain it was purely a phraseology of Mr. Stark who drew the instrument. As a matter of fact, Mr. Fleishhacker could do nothing about that so far as the terms of the contract were concerned, if Mr.

Goldie refused to deliver the stock for cancellation or make arrangements with the bank to have it divided in its respective form. Under the particular agreement, Mr. Goldie had the obligation to proceed to have the stock divided in two certificates and have one issued to Mr. Fleishhacker as collateral. The mere fact that he had [53] financial obligations which made it financially difficult for Mr. Goldie to do, certainly cannot warrant an attempt to vary the terms of this written instrument; neither can they bring in attempts of the parties other than based on the four corners of that document.

The Referee: Do I understand this, Mr. Stark, this condition was prevailing so far as the bank is concerned at the time the contract was drawn?

Mr. Stark: The situation was this, Your Honor: At the time the contract was drawn and many years before that the stock holdings of Mr. Goldie had been pledged to the Anglo California National Bank. The contract was made, and no one knows more about the contract than I do. The contract was made on the statement of Mr. Fleishhacker that he would be able to get a release of a portion of that stock from the pledge.

The Referee: But, was that incorporated in the contract?

Mr. Stark: Yes, Your Honor.

Mr. Glicksberg: We submit, if Your Honor please, we would like counsel to show us that in the contract.

The Referee: Point it out, Mr. Stark.

Mr. Stark: I read it to you once.

The Referee: I would like to hear it again.

Mr. Stark: In the first place the contract is signed by Mr. Goldie and Mr. Fleishhacker. Page 2, the first paragraph of the charging clause of the contract, following the "Witnesseth" provides:

"That the parties hereto", p-a-r-t-i-e-s; not "party"; not Mr. Goldie or not Mr. Fleishhacker alone, but the two of them acting jointly together,

"Shall forthwith, upon the execution of this agreement, cause to be delivered to the transfer agent of Pacific Products, Inc., [54] a corporation, the stock certificate"

Nowhere did the contract say the parties should, because the parties knew the stock was pledged to the Anglo Bank.

Mr. Glicksberg: If Your Honor please, we are going to object to Mr. Stark's making any statement in the record of any intention of the parties that cannot be gathered from the four corners of the instrument. He knows legally that we cannot introduce any intention other than the Court can determine from the written instrument itself. If Mr. Stark, when he drew the instrument, had a different intention, he should have placed it in this instrument to protect his client. He has not done so and I submit that Mr. Goldie is bound by the terms of the instrument as it appears in Court today.

The Referee: That is the very reason why I

wanted to know if this was known to the parties at the time the contract was drawn.

Mr. Stark: Indeed it was.

The Referee: Then the offer may be denied and the objection sustained.

Mr. Stark: That is on the point of my offer of proof?

The Referee: Yes.

Mr. Stark: That it was the duty of both parties to perform the mechanics of splitting this stock off.

The Referee: Yes.

Mr. Stark: May I have an exception, Your Honor?

The Referee: Yes.

Mr. Stark: That is all.

(Witness excused.)

Mr. Stark: Mr. Thompson. [55]

HARRY T. THOMPSON,

called for the Respondent, sworn.

Mr. Stark: Q. Mr. Thompson, what is your business or avocation?

A. Well, I am an employee of the Anglo California National Bank.

Q. Have you a special employment of some kind? Have you acted as a special employee?

A. I am acting as secretary for Mr. Fleishacker, with the approval of the bank.

(Testimony of Harry T. Thompson.)

Q. That is, for Mr. Herbert Fleishhacker?

A. That is right.

Q. How long have you acted as such?

A. About 20 years.

Q. Continuously? A. Yes.

Q. Mr. Thompson, do you know of your own knowledge whether or not Mr. Fleishhacker ever made any effort to get any portion of the stock of the Pacific Products Company, standing in the name of Mr. Goldie on pledge with the bank, released from the pledge? A. I do——

Mr. Glicksberg: One minute. We are going to object to that as entirely incompetent, irrelevant and immaterial, and an attempt to vary the terms of a written instrument.

The Referee: I suppose he is entitled to this preliminary answer. The objection is overruled on the preliminary question and answer.

(Question read.)

The Referee: Answer that yes or no.

The Witness: A. No.

Mr. Stark: Q. You don't know whether or not an effort was made? A. I do not.

Q. Have you ever discussed with Mr. Fleishhacker as to whether or not he approached the bank in regard to releasing stock from the [56] pledge?

Mr. Glicksberg: We are going to object to that, if Your Honor please, as entirely incompetent, irrelevant and immaterial, certainly a self-serving

(Testimony of Harry T. Thompson.)

declaration, an attempt to secure a self-serving declaration.

Mr. Stark: I submit it, Your Honor.

The Referee: Well, particularly on the ground that it is incompetent and irrelevant, I will sustain the objection, because I think it would be purely hearsay at this time, at this state of the proceeding.

Mr. Stark: Q. Do you know anything about an item of \$1,394.93, that is referred to in this letter of September 20, 1938, Receiver's Exhibit No. 2?

The Witness: A. I am familiar with the letter. I know that it was deducted.

Q. Do you know whether or not it was deducted as a conclusion to conversations that were had between parties? A. My recollection is yes.

Q. I am not asking you for the substance of the conversation, but the parties had conferred in regard to the time and the exhibit with that \$1,394.94 item referred to was the fruition of those conversations? A. That is my recollection.

Mr. Stark: That is all, Mr. Thompson.

Cross Examination

Mr. Glicksberg: Just a minute, Mr. Thompson.

Q. From your own records, Mr. Fleishhacker was indebted to the Edward J. Goldie Importation Company for \$1,119.94 of that amount. Is that correct? A. That is right.

Q. When you testified that it was deducted, what did you mean?

(Testimony of Harry T. Thompson.)

A. Deducted from the dividend due Mr. Fleishhacker on the [57] 3,000 shares.

Q. Has Mr. Fleishhacker received any dividends other than that \$1,800?

A. Not to my knowledge.

Q. You mean to say it was deducted on your records?

A. Well, I don't know whether I had any record of it or not except the written correspondence.

Q. Then it was not deducted from any place. It was considered an obligation of Herbert Fleishhacker to the Edward J. Goldie Importation Company?

A. The letter speaks for itself.

Q. Then it was an obligation of Mr. Fleishhacker to the Edward J. Goldie Importation Company?

A. That is right.

Mr. Glicksberg: That is all.

Redirect Examination

Mr. Stark: Q. Mr. Thompson, the subject matter of this contract had been a matter of conversation between the parties over a period of years prior to taking form?

A. I understand——

Mr. Glicksberg: I am going to object to that as entirely incompetent, irrelevant and immaterial.

Mr. Stark: Don't answer too hurriedly.

The Referee: It may go out.

Mr. Glicksberg: As entirely incompetent, irrelevant and immaterial and an attempt to vary the terms of a written instrument.

(Testimony of Harry T. Thompson.)

The Referee: Yes, if it was prior to the making of the written instrument, the California Code Section takes care of that, Mr. Stark, and the objection is sustained.

Mr. Stark: May I have an exception, Your Honor?

The Referee: Yes.

Mr. Stark: Q. Was there any money paid by Mr. Goldie over to Mr. Fleishhacker by way of dividends on the 3,000 shares of Rainier Brewing Company A stock prior to the making of that contract? [58]

Mr. Glicksberg: We are going to object to that, Your Honor, as entirely immaterial, not within the issues before this Court at the present time.

The Referee: It may be sustained.

Mr. Stark: May I have an exception, Your Honor?

The Referee: Yes. That is made strictly on the proposition that there is a Code Section that covers all negotiations and matters that happened prior to the making of the contract.

Mr. Stark: That have been reduced to writing.

The Referee: And merged in the contract.

Mr. Stark: Unless there exists an ambiguity in the writing.

The Referee: In the event there is, I think the only question that can be raised would be a question of fraud.

(Testimony of Harry T. Thompson.)

Mr. Stark: Of course, we are making no such point as that; simply a failure of the parties to meet from the standpoint of minds.

The Referee: If there is an ambiguity of the contract, you can give testimony interpreting the contract.

Mr. Stark: Yes.

The Referee: But you cannot, as I understand, go back and incorporate in the contract by interpretation something that transpired prior to the making of the contract.

Mr. Stark: We contend no ambiguity exists. Counsel for the receiver is the one who is contending for the ambiguity.

Mr. Glicksberg: Oh, no, we are satisfied with the agreement.

The Referee: If there is no ambiguity, then strictly the objection is sustainable.

Mr. Stark: All right. Thank you very much, Mr. Thompson.

(Witness excused.)

Mr. Stark: We rest on the jurisdictional question, Your Honor. [59]

I would like an opportunity to file some points and authorities with Your Honor.

The Referee: Very well. Suppose I continue the whole matter until Friday with the understanding that all briefs will be in.

Mr. Stark: Next Friday?

The Referee: Yes. I don't want to drag it along. You should be pretty well ready with all your points and authorities.

Mr. Stark: I have them collected. It is a matter of having them put on paper.

The Referee: Why not put it in letter form. I don't care for much argument; I don't go much on attorneys' argument. I take the cases myself and try to supply some that counsel have not found.

Mr. Stark: Yes. I think probably I could have it in by next Friday. I am under the gun in a matter in San Rafael.

The Referee: I don't want to put you in any spot. Suppose I give you until next Friday to put yours in and then to the following Friday, May 5, to put theirs in.

Mr. Stark: And then will the matter stand submitted?

The Referee: Yes, on two briefs, unless you want to answer, Mr. Stark, strictly on the jurisdictional point.

Mr. Stark: I understand, Your Honor, in fixing the time now, I am probably entitled to answer on the merits if you should rule adversely on the jurisdictional point.

The Referee: There is no question about that, Mr. Stark. I understand you will have two briefs?

Mr. Stark: That is satisfactory to me.

The Referee: Yours to be in by next Friday, just a letter written to them and to me. They can do

the same way and I would like theirs in not later than the day before, Thursday. [60]

Mr. Walsh: If Your Honor please, we have already introduced the photostatic copy of the agreement and we would like at this time to substitute the photostatic copy already in evidence in this proceeding and to take back the original.

Mr. Stark: That is quite satisfactory. As a matter of fact, I know it was stipulated that the copy of the document attached to the original petition, pursuant to which the order to show cause was issued, constitutes a true copy of the contract.

Mr. Walsh: That is satisfactory.

The Referee: Very well, with that understanding the attorney for the receiver is receiving back Receiver's Exhibit No. 1. The matter then stands over, this particular matter stands over to May 5, 1939, at 10 o'clock.

(Adjourned to May 5, 1939, at 10 A. M.)

[Endorsed]: Filed Apr. 26, 1939. [61]

[Title of District Court and Cause.]

Friday, May 19, 1939

(Re: Joseph Goldie)

Appearances:

Sterling Carr, Esq., Receiver;

Francis P. Walsh, Esq., and Louis J. Glicks-
berg, Esq., Attorneys for the Receiver;

Charles M. Stark, Esq., Attorney for Joseph
Goldie. [62]

Mr. Stark: May I interrupt, Your Honor? I have a matter on the calendar. We represent the respondent Joseph Goldie.

As I understand the decision of the Circuit Court of Appeals in the case of Pearson v. Higgins, which we defended in the Circuit Court of Appeals, the respondent in this case has an alternative right: He may stand silent and have an order made against him adjudicating the merits of the controversy; or, he may go to the merits and appeal or review, Your Honor, from the final decision.

We are of the opinion that the defense we have made to the summary jurisdiction of the forum here is sound, and therefore, we elect to stand mute, of course, not waiving any rights that we have in regard to the merits of the controversy, and let Your Honor take such action as you see fit in regard to it.

The Referee: I have in mind something else, Mr. Stark. Isn't there a decision holding that after a

petition for review is filed, the referee has no power over the matter?

Mr. Stark: I am not prepared to say.

The Referee: I think there is.

Mr. Stark: That is ipso facto a supersedeas?

The Referee: That is my understanding.

Mr. Stark: Possibly, that is so. However, Your Honor will recall *Pearson v. Higgins* in 24 A.B.R., New Supplement, I think at page 16, where the Circuit Court of Appeals for the Ninth Circuit held this: That where an order has been made by the referee asserting that he had jurisdiction to determine the merits of the controversy and an appeal or a review from the order has been timely taken—the Circuit Court of Appeals says that for all the petitioner knew, when the merits were heard, he might win his case and therefore he would not be injured by the adoption of that forum [63] of summary jurisdiction and they sent that case back to be tried on the merits and in the decision they said that the respondent had an election of two manners of procedure: He might stand silent and have an order on the merits made against him or might go to the merits and review the final order bringing up both the jurisdictional point and the meritorious point if he desired.

The Referee: I am going to follow my own ideas on that regardless of what the Circuit Court of Appeals said. My idea is that I haven't any more power over that order until the petition for review is passed upon. That is what I am going to do about it.

Mr. Stark: Of course, that gives us no concern one way or the other.

The Referee: It does not give me any concern. I just announced what I am going to do.

Mr. Stark: Then as I take it, there will be no order made on the merits in the matter.

The Referee: I am not going further in the matter until that is determined.

Mr. Stark: Only so far as you have already determined.

The Referee: I have made an order, you have taken a review. Until that is passed on, nothing is going to be done.

Mr. Stark: Very well.

Mr. Walsh: If Your Honor please, in order to protect the record of the receiver at this time I am going to make a motion that the default of Mr. Joseph Goldie be entered for failing to comply with the order of the court directing him to answer.

The Referee: The motion will be denied because that will be taken care of when the matter is ruled on. [64]

Mr. Stark: That would be quite contrary to what Your Honor just stated as your viewpoint.

The Referee: In other words, I take it that if my position is ruled upon, that is, if the court sustains me in my position, the default is there, not having followed out the order of the court.

Mr. Walsh: I am merely protecting the record.

The Referee: Very well.

[Endorsed]: Filed Apr. 26, 1939.[65]

[Title of District Court and Cause.]

OPINION, FINDINGS, CONCLUSIONS AND
ORDER ON OBJECTION TO COURT'S
JURISDICTION TO PROCEED SUMMAR-
ILY

There is but one question before the court at this time, that is, has this court the right to proceed summarily against the respondent, Joseph Goldie, who has challenged the Court's jurisdiction so to do?

In passing upon said question, the only record which the court is entitled to have before it is that presented by the verified petition of the receiver, the order to show cause directed against Joseph Goldie, the latter's written objection to the court's jurisdiction, and the evidence on the hearing relative to the question of jurisdiction, and not otherwise.

Based upon such record, and more particularly upon the written objection of said respondent, Joseph Goldie, and said evidence, the court finds the following facts:

1. That by reason of the form and substance of his written objection to the court's jurisdiction, the respondent, Joseph Goldie, has waived, and did waive, the objection to jurisdiction and now is before the court by a general appearance, and for all purposes;

2. That by calling the witnesses, Leon Sloss, Jr., and Harry T. Thompson, and subjecting them to oral examination on behalf of said respondent, said respondent, Joseph Goldie, has waived, and did

waive, the objection to jurisdiction and now is before the court for all purposes;

3. That said respondent, Joseph Goldie, at the time of the filing of the petition by the debtor herein, and also at the time of the filing of said petition by said receiver, was, and now is acting as a trustee of said debtor, and [69]

4. That said respondent, Joseph Goldie, at the time of the filing of the petition by the said debtor, and also at the time of the filing of said petition by said receiver, was, and now is, indebted to the debtor, but that the court, without waiving the right so to do at a later date, at this time, in passing upon the question of jurisdiction, does not undertake to pass upon the amount of said indebtedness.

Upon the facts as found herein, the court concludes as matters of law:

1. That both by his written objection to the jurisdiction and by calling the aforesaid witnesses, the respondent, Joseph Goldie, has appeared herein generally and made a response to the receiver's said petition upon the merits;

2. That the receiver is entitled to proceed summarily herein against said respondent, Joseph Goldie, a trustee of said debtor;

3. That said respondent, Joseph Goldie, is entitled to a reasonable time within which to file a further response, upon the merits, to the receiver's petition and order to show cause, and

4. That to the end that the matter may be fully presented upon the merits, said respondent, Joseph

Goldie, is entitled to the process of this court to have produced such further competent evidence as he may be desirous of offering, whether said evidence is sought to be given by witnesses orally, or by documentary evidence, not including affidavits.

It is therefore hereby ordered, adjudged and decreed that the objection of the respondent, Joseph Goldie, to the jurisdiction of this court to proceed summarily upon the receiver's petition and order to show cause be, and it is, overruled, that the said respondent be given five days [70] from this date within which to make further response, upon the merits, to said petition and order to show cause, if he be so advised, and that the hearing upon said petition and order to show cause, upon the merits, be, and said hearing is, fixed for the 19th day of May, 1939, at the hour of 10 o'clock A. M.

Dated: May 5th, 1939.

BURTON J. WYMAN,

Referee in Bankruptcy.

[Endorsed]: Filed May 5, 1939. [71]

[Title of District Court and Cause.]

PETITION TO REVIEW ORDER
OF REFEREE

The petition of Joseph Goldie respectfully shows:

That in the course of the proceedings herein, to-wit, on the 5th day of May, 1939, an order was made by the Referee overruling the plea of your

petitioner objecting to the summary jurisdiction of the court, which order is designated "Opinion, Findings, Conclusions and Order on Objection to Court's Jurisdiction to Proceed Summarily", a copy of which is hereto annexed and marked Exhibit "A". [72]

I.

That such order was and is erroneous in that said order purports to hold that by reason of the form and substance of the written objection of your petitioner to the court's summary jurisdiction your petitioner has waived and did waive the objection to the jurisdiction of the court and was before the court by a general appearance and for all purposes; whereas, your petitioner, in his verified return required to be filed by him, appeared specially and not otherwise for the sole purpose of objecting to the summary jurisdiction of the court and moving said court for an order quashing the service of the order to show cause made upon him and, in his return to the order to show cause issued by the referee, set forth therein the facts sustaining his plea objecting to the jurisdiction of said court.

II.

That said order of the referee was and is erroneous in that the Referee has purportedly held that by reason of your petitioner calling witnesses and submitting them to oral examination on his behalf said petitioner has waived and did waive the objection to the jurisdiction of the court and is now be-

fore the court for all purposes; whereas, your petitioner was required, by reason of the order to show cause issued by the Referee, to call witnesses in order to support the facts set forth in his return and offer proof of the transactions had upon which he based his claim as an adverse claimant and to sustain his plea objecting to the summary jurisdiction of the Referee to hear or determine the adverse claim of your petitioner.

III.

That said order was and is erroneous in that the said Referee has attempted to make a finding and did make a finding upon the merits of the controversy between your petitioner and the Receiver in that said order finds as a matter of fact that [73] your petitioner was and now is acting as a trustee of Herbert Fleishhacker, the debtor in the above entitled proceedings.

IV.

That said order was and is erroneous in that the said Referee has attempted to make a finding and did make a finding upon the merits of the controversy between your petitioner and the Receiver in that said order finds as a matter of fact that your petitioner was and now is indebted to the debtor, Herbert Fleishhacker.

V.

That said order of the Referee was and is erroneous in that said findings of fact that your petitioner was and is a trustee and was and is a debtor

of said Herbert Fleishhacker did attempt to finally adjudge that your petitioner has become liable to said Receiver as such trustee and as such debtor, and has denied to your petitioner the right to have the issues as to whether or not your petitioner was and is a trustee of said debtor or was and is indebted to said debtor tried in a plenary proceeding as demanded by said petitioner.

VI.

That said order of the Referee was and is erroneous in that the said Referee concludes as a matter of law that by reason of said findings made by him over the objection of your petitioner appearing specially that your petitioner has appeared generally and made response to the Receiver's petition upon the merits and that said Receiver is entitled to proceed summarily herein against your petitioner as a trustee of Herbert Fleishhacker, the debtor herein.

VII.

That said order of the Referee was and is erroneous in that while said order purports to allow your petitioner a right to plead upon the merits and proposes that he subject himself to [74] the summary jurisdiction of the Referee, while in truth and in fact said order has attempted to finally adjudge the issues summarily over the objection of your petitioner, excepting the Referee has reserved a right to determine the amount of the alleged indebtedness by your petitioner to said debtor and his said Receiver.

VIII.

That said order was and is erroneous in that upon a further hearing before said Referee, pursuant to his asserted summary jurisdiction, said petitioner will be precluded from the right as a matter of law to present any evidence upon the issues as to whether or not he is or was acting as a trustee for said debtor and whether or not he is or was indebted to said debtor at the time of the commencement of said proceedings or at the time of the filing of the petition for an order to show cause by the Receiver.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that same may be reviewed by a judge of this court as provided in the Acts of Congress relating to bankruptcy.

JOSEPH GOLDIE,

Petitioner.

TORREGANO & STARK

By CHARLES M. STARK,

Attorneys for Petitioner. [75]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Joseph Goldie, being first duly sworn, deposes and says:

That he is the petitioner named and described in the foregoing Petition to Review; that he has read said Petition, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

JOSEPH GOLDIE.

Subscribed and sworn to before me this 11th day of May, 1939.

[Seal] LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

(Service of copy admitted.)

[Endorsed]: Filed May 12, 1939. [76]

[Exhibit "A," hereto attached, is identical with "Opinion, Findings, Conclusions and Order on Objection to Court's Jurisdiction to Proceed Summarily" set out at pages 76 to 78 of this printed record.] [77]

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE
ON PETITION FOR REVIEW OF ORDER
OF REFEREE ON OBJECTION OF
JOSEPH GOLDIE TO COURT'S JURIS-
DICTION TO PROCEED SUMMARILY

To Honorable A. F. St. Sure, United States District
Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of this court and the referee in charge of this proceeding respectfully certify and report:

On the 3rd day of April, 1939, the following verified petition for summary order directed to Joseph

Goldie to turn over to receiver certain securities and moneys belonging to debtor was filed herein: [78]

“The petition of Sterling Carr respectfully represents:

“I.

“That ever since the 26th day of January, 1939, petitioner has been and now is the duly and regularly appointed, qualified and acting Receiver for the estate of Herbert Fleishhacker, the above named Debtor;

“II.

“That at all of the times herein mentioned, Rainier Brewing Company, Inc., was and now is a corporation incorporated, organized and existing under and by virtue of the laws of the State of California, duly authorized to do business, and doing business, in said State, and with its principal place of business in the City and County of San Francisco, in said State;

“That the capital stock of said corporation is divided into shares of Class “A” common stock and Class “B” common stock;

“III.

“That at all of the times herein mentioned, Pacific Products, Inc. was and now is a corporation incorporated, organized and existing under and by virtue of the laws of the State of California, duly authorized to do business, and doing business, in said State, and with its prin-

incipal place of business in the City and County of San Francisco, in said State;

“IV.

“That upon the 29th day of September, 1937, Herbert Fleishhacker, the Debtor herein, and Joseph Goldie made and entered into a written agreement, a copy of which is hereunto annexed, marked ‘Petitioner’s Exhibit A’ [79] and made a part hereof, as fully as if set forth in full herein;

“V.

“That amongst the assets of said Debtor delivered to your Receiver were certain claims of said Debtor against the said Joseph Goldie in accordance with the terms and provisions of said agreement, a copy of which is hereunto annexed;

“VI.

“That in accordance with the terms of said agreement, said Joseph Goldie agreed, within a period of two years from September 29, 1937, to deliver to said Herbert Fleishhacker three thousand (3000) shares of the Class ‘A’ common stock of said Rainier Brewing Company, Inc., and further agreed, as collateral for the performance of the terms of the aforementioned agreement to deliver to the said Herbert Fleishhacker, five hundred thirty-nine (539) shares of Class ‘A’ Cumulative Preferred stock of Pacific Products, Inc., immediately after the execution of said agreement;

“VII.

“That in accordance with the terms of said agreement, said Joseph Goldie further agreed to deliver to Herbert Fleishhacker, said Debtor, any and all dividends received by the said Goldie declared on and after the 29th day of September, 1937, upon said 3,000 shares of the Class ‘A’ common stock of Rainier Brewing Company, Inc.

“VIII.

“Petitioner further alleges that the said Joseph Goldie at all of the times herein mentioned, up to and including the 23d day of November, 1938, has failed and [80] refused to deliver to the said Herbert Fleishhacker said 539 shares of Pacific Products, Inc., Class ‘A’ 7% Cumulative Preferred stock as collateral under the terms of said agreement;

“That the said Goldie has also failed to deliver to the said Herbert Fleishhacker any or all of the dividends that the said Goldie has received since September 29, 1937, upon said 3,000 shares of Class ‘A’ common stock of Rainier Brewing Company, Inc., save and except the sum of eighteen hundred (1800) dollars which was paid on the 20th day of September, 1938;

“IX.

“That petitioner further alleges that the following dividends have been declared by said Rainier Brewing Company, Inc., on Class ‘A’

common stock, the proceeds of which have been received by the said Joseph Goldie, to-wit:

October	21, 1937—	\$1.30 per share
November	20, 1937—	.15 per share
Sept.	16, 1938—	.60 per share
October	24, 1938—	1.15 per share
December	29, 1938—	.60 per share

Payable as follows:

January	10, 1939—	20c per share
February	10, 1939—	20c per share
March	10, 1939—	20c per share

“Petitioner alleges that the said Joseph Goldie, on and after the 29th day of September, 1937, and up to the present date, has received the total sum of \$11,400.00 on said 3,000 shares of common stock of Rainier Brewing Company, Inc., as dividends, and which dividends, under the terms of said agreement herein referred to, were agreed to be paid by the said Goldie to the said Herbert Fleishhacker; that no part of said sum has been paid to [81] the said Herbert Fleishhacker save and except said sum of \$1,800.00; that there is now due and payable to the said Herbert Fleishhacker, Debtor herein, and to Sterling Carr, Receiver for the estate of said Debtor, the sum of nine thousand six hundred & 00/100 (9,600) dollars;

“X.

“Your petitioner further alleges that demand has been made upon the said Joseph

Goldie by your petitioner as Receiver for the estate of Herbert Fleishhacker, Debtor, for the delivery to said Receiver of said 539 shares of Pacific Products, Inc., to be held by said Receiver as collateral under the terms of said agreement, and for the sum of \$9,600. due the said Herbert Fleishhacker in accordance with the terms of said agreement; that at all of the times herein referred to, the said Joseph Goldie has failed and refused and still fails and refuses, without right or cause, to deliver to your petitioner the said 539 shares of Pacific Products, Inc., or said sum of \$9,600.00 or any part thereof;

“XI.

“That in accordance with the terms of said agreement, a copy of which is attached hereto and marked ‘Exhibit A’, the said Herbert Fleishhacker, Debtor herein, at all of the times herein mentioned was and now is entitled to delivery to him of said 539 shares of Pacific Products, Inc.; that the said Joseph Goldie is now holding said 539 shares in trust for the said Herbert Fleishhacker; [82]

“That since the execution of said agreement the said Joseph Goldie has received the total sum of \$11,400.00 as dividends on said 3000 shares of Class ‘A’ common stock of Rainier Brewing Company, Inc.; that by the terms of said agreement, the said Herbert Fleishhacker is entitled to receive said sum, but that no part

thereof has been paid to said Herbert Fleishacker save and except said sum of \$1,800.00, and that said Joseph Goldie is now holding the balance of said dividends, to-wit, the sum of \$9,600.00, in trust for the said Herbert Fleishacker, the Debtor above named;

“Wherefore, petitioner prays:

“(1) That this Court issue its order directed to the said Joseph Goldie, to show cause, if any he has, upon a date certain, to be fixed by this Court, why he should not be ordered, compelled and required to turn over and deliver to petitioner as such Receiver, 539 shares of Class ‘A’ 7% Cumulative Preferred stock of Pacific Products, Inc. in accordance with the terms of said agreement specifically set forth in said Petitioner’s Exhibit ‘A’ attached hereto, together with dividends aggregating the sum of \$9,600.00 due petitioner as such Receiver in accordance with the provisions of said agreement;

“(2) And for such further and additional relief as this Court shall deem proper.

“STERLING CARR,

“Receiver for the Estate
of Herbert Fleish-
hacker, Debtor.

Petitioner.

“Francis P. Walsh,

“Louis J. Glicksberg,

“Attorneys for Petitioner.”

[Verification omitted for sake of brevity.] [83]

Attached to said petition as petitioner's Exhibit "A" and referred to in said petition, was and is a copy of the following agreement:

"Whereas, Joseph Goldie is obligated to Herbert Fleishhacker entitling the said Herbert Fleishhacker to receive from the said Joseph Goldie, 3,000 shares of the Rainier Brewing Company, Inc., a corporation, Class 'A' common stock; and

"Whereas, the said Joseph Goldie desires to assure the said Herbert Fleishhacker of the ultimate payment of said obligation for the delivery of said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock; and

"Whereas, Pacific Products, Inc., a corporation, is the owner of 59,622 shares of the Class 'A' common stock of the Rainier Brewing Company, Inc., a corporation, and 258,092 shares of the Class 'B' common stock of the Rainier Brewing Company, Inc., a corporation; and

"Whereas, Joseph Goldie is the owner of 1924-4/10ths shares of the Class 'A' 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation; and

"Whereas, it is the desire of the parties hereto that the said Joseph Goldie pledge to Herbert Fleishhacker so much of the Class 'A' 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation, owned by him as will secure to the said Herbert Fleishhacker the ulti-

mate delivery to him by said Joseph Goldie of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock.

“Now therefore, this Agreement,

“Witnesseth:

“That the parties hereto shall forthwith upon the execution of this agreement cause to be delivered to the [84] transfer agent of Pacific Products, Inc., a corporation, the stock certificate now standing in the name of Joseph Goldie, representing his ownership of 1,924-4/10ths shares of Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred stock, with directions to said transfer agent and company to split said certificate into one certificate of 539 shares and one certificate of 1,385-4/10ths shares, each of said certificates as split to be reissued by said company and said transfer agent in the name of Joseph Goldie.

“It is further mutually agreed and understood between the parties hereto that said certificate representing 539 shares of Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred stock, shall be forthwith by said Joseph Goldie endorsed and delivered to said Herbert Fleishhacker, and shall thenceforth be held in pledge by said Herbert Fleishhacker, subject however to the following express agreements.

“That the said Joseph Goldie may at any time within two years from the date of this

agreement acquire and deliver to the said Herbert Fleishhacker 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock, and upon delivery of such stock of Rainier Brewing Company, Inc., a corporation, the said Pacific Products, Inc., a corporation, stock hereby pledged shall be forthwith returned to the said Joseph Goldie by the said Herbert Fleishhacker, and the said obligation of each of the parties hereto shall thereby stand discharged in full.

“It is further expressly agreed and understood that the said Joseph Goldie may at any time within two years of the date of this agreement pay in lawful money of the United States of America to the said Herbert Fleishhacker, [85] the equivalent of the market value at the time of said payment of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock, and shall thereupon be entitled to the return of the stock of the Pacific Products, Inc., a corporation, hereinabove provided to be pledged to the said Herbert Fleishhacker, and thereupon the obligation of the parties hereto, each to the other, shall stand discharged in full.

“It is further expressly agreed and understood that Joseph Goldie may at any time within two years of the date of this agreement pay to the said Herbert Fleishhacker in lawful money of the United States of America, the

equivalent of the market value at the time of said payment of not less than 750 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock, and shall thereupon be entitled to the return of 25% of the Pacific Products, Inc., a corporation, stock hereby pledged to the said Herbert Fleishhacker, and upon each successive payment of not less than 25%, or the delivery of not less than 750 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock to the said Herbert Fleishhacker, shall forthwith be entitled to the return of an additional 25% of the said stock hereby pledged to the said Herbert Fleishhacker, until such time as the full amount of said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock, has been delivered to the said Herbert Fleishhacker, or the full amount of the value of the said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock has been paid to the said Herbert Fleishhacker.

“It is further expressly understood and agreed that [86] Joseph Goldie may at his option at any time within two years from the date of this agreement, sell, transfer or set over absolutely to the said Herbert Fleishhacker 450 shares of Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred stock, and upon such transfer of said 450 shares to the said Herbert Fleishhacker the obligation of the par-

ties hereto, one to the other, shall stand discharged in full.

“It is further expressly understood and agreed that during the life of this agreement any dividends declared and paid by the said Pacific Products, Inc., a corporation, on the said shares of stock hereby deposited with the said Herbert Fleishhacker, which dividends are paid from funds acquired by the said Pacific Products, Inc., from any source other than from moneys paid to it as dividends on stock owned by it of Rainier Brewing Company, Inc., a corporation, shall not be payable to the said Herbert Fleishhacker but shall constitute dividends payable to the said Joseph Goldie.

“It is further expressly understood and agreed that during the life of this agreement that as to all dividends declared and paid by the Rainier Brewing Company, Inc., a corporation, to Pacific Products, Inc., a corporation, which in turn give rise to payments of dividends by the Pacific Products, Inc., a corporation, to its stockholders, the said Herbert Fleishhacker shall receive such portion of such dividends as would be paid to him were he the owner of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class ‘A’ common stock.

“It is further expressly understood and agreed that the provisions of the within agreement embrace the entire agreement on the sub-

ject matter between the parties hereto, [87] and cancels, supersedes and replaces all prior and other agreements, and the benefits and obligations herein set forth flowing to and from each of the parties hereto shall inure to and be binding upon the heirs, administrators and assigns of the parties hereto.

“In witness whereof, we have hereunto set our hands and seals this 29th day of September, 1937.

“(Signed) JOSEPH GOLDIE

“(Signed) HERBERT FLEISHHACKER

(See the original of said petition, with said Exhibit attached, handed up herewith as a part of this certificate and report.)

Based upon said petition, the following order to show cause was issued on said April 3, 1939:

“Sterling Carr, Receiver for the estate of Herbert Fleishhacker, the Debtor above named, having filed herein his petition praying for an order directed to Joseph Goldie, to show cause why he should not be compelled and required to turn over and deliver to said Receiver 539 shares of Class ‘A’ 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation, in accordance with the provisions of a certain agreement specifically set forth in said petition, together with dividends in the sum of \$9,600.00 due petitioner as such Receiver in accordance with the terms of said agreement; and

“Good cause appearing therefor, it is hereby ordered that said Joseph Goldie show cause, if any he has, before the undersigned Referee in Bankruptcy at his courtroom, Room 609 Grant Building, 1095 Market Street, San Francisco, California, on the 14th day of April, 1939, at the hour of 10 A.M., why said petition of said Receiver should not be granted; and [88]

“It is further ordered that a copy of this order to show cause, together with a copy of said petition, be served upon the said Joseph Goldie at least 5 days before the return date hereof.

“Dated: April 3, 1939.

BURTON J. WYMAN,
Referee in Bankruptcy.”

(See original of said order to show cause, handed up herewith as a part of this certificate and report.)

Thereafter, and on the 13th day of April, 1939, the following verified “plea” of respondent, Joseph Goldie, was filed herein:

“Now comes Joseph Goldie, of the City and County of San Francisco, State and District aforesaid, respondent to an order to show cause issued by the above entitled court on the 3d day of April, 1939, and returnable on the 14th day of April, 1939, and appearing specially and not otherwise for the purpose of objecting to the summary jurisdiction of the above entitled

court and moving said court for an order quashing the service of said order to show cause, and for grounds of his plea objecting to the jurisdiction of the above entitled court alleges:

“1. That it affirmatively appears from the petition of the receiver, Sterling Carr, upon which said order to show cause was issued by the above entitled court, that the above entitled court was and is without jurisdiction to hear and determine the matters therein stated or to make any order against the respondent therein named except by consent of this respondent, and that this respondent has never consented [89] to submit himself to the jurisdiction of the above entitled court but, on the contrary, this respondent has declined and does decline to submit himself to the jurisdiction of the above entitled court to hear and determine any of the matters set forth in said receiver’s petition or be subjected to any orders of the above entitled court pertaining to any of the matters set forth in said receiver’s petition.

“2. That it affirmatively appears from the face of said receiver’s petition and the order to show cause issued by the above entitled court, that the facts stated in said receiver’s petition do not confer upon the above entitled court summary jurisdiction over said respondent without his consent.

“3. That it affirmatively appears from said receiver’s petition, upon which said order to

show cause was issued, and from said order to show cause, that the issues which the receiver seeks to submit to the above entitled court as grounds for the granting of the prayer of said petition can only be determined in a plenary action and not in a summary proceeding instituted by said receiver herein, and it affirmatively appears from said petition that no summary jurisdiction can be exercised by the above entitled court as it relates to this respondent without the consent of this respondent.

“That this respondent is entitled to have said issue determined in a plenary action and to have a trial by jury of the issues raised in said petition pursuant to his demand.

“For a further, separate and distinct objection to the summary jurisdiction of the above entitled court, [90] this respondent alleges as follows, to-wit:

“That at the time of the making of the contract, a copy of which is attached to the petition of the receiver herein, the property referred to in said contract as constituting one thousand nine hundred twenty-four and four-tenths (1,924 4/10) shares of the preferred stock of Pacific Products, Inc., a corporation, Class ‘A’ Cumulative 7%, was not in the possession of respondent, Joseph Goldie, nor in the possession of Herbert Fleishhacker, but, on the contrary, said stock, and each and every share thereof, had been theretofore pledged by re-

spondent to the Anglo California National Bank to secure the repayment by respondent of a sum of money owing by respondent to said Anglo California National Bank, aggregating at the time of the making of said contract the sum of One Hundred Thirty-six Thousand Six Hundred Thirty-eight and 62/100 Dollars (\$136,638.62);

“That said stock, and each and every share thereof, was held by said Anglo California National Bank as security for the repayment by respondent of the sum of money hereinabove set forth;

“That at the time of the making of said contract, it was agreed that Herbert Fleishhacker and respondent would obtain a release by said Anglo California National Bank of so much of said stock as was agreed in said contract would be deposited with the said Herbert Fleishhacker, to-wit, five hundred thirty-nine (539) shares;

“That at no time prior to the making of said contract or at the time of the making thereof was the respondent the owner of any shares of Rainier Brewing Company, Inc., a corporation, Class ‘A’ Common Stock, but all of the [91] interest of said respondent in said Rainier Brewing Company, Inc., a corporation, was represented by respondent’s ownership, subject to the pledge to the Anglo California National Bank, as aforesaid, of the one thousand nine

hundred twenty-four and four-tenths (1,924-4/10) shares of the Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred stock referred to in said contract, and at no time was it within the terms of the agreement between respondent and said Herbert Fleishhacker that both the five hundred thirty-nine (539) shares of Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred stock, and three thousand (3,000) shares of Rainier Brewing Company, Inc., a corporation, Class 'A' Common stock, would be delivered to Herbert Fleishhacker in pledge.

“Respondent further alleges that at the time of the making of said agreement, it was being discussed amongst the owners of all of the corporate stock of the Pacific Products, Inc., a corporation, that the assets of the Rainier Brewing Company, Inc., a corporation, would be transferred to Pacific Products, Inc., a corporation, and, thereupon, the name of the Pacific Products, Inc., a corporation, would be changed to that of the Rainier Brewing Company, Inc., a corporation, and that the Rainier Brewing Company, Inc., a corporation, then in existence at the time of the making of said contract would be dissolved, and upon the happening of said events respondent would have been in a position to deposit with the said Herbert Fleishhacker three thousand (3,000) shares of Rainier Brewing Company, Inc., a

corporation, Class 'A' Common stock, if and when said [92] three thousand (3,000) shares were released from the pledge of the Anglo California National Bank;

“That respondent was informed by Herbert Fleishhacker that if respondent would give to him an agreement pledging three thousand (3,000) shares of Rainier Brewing Company, Inc., Class 'A' Common stock, when the reorganization above referred to was accomplished he, the said Herbert Fleishhacker, would be able to get released from the pledge of the Anglo California National Bank said three thousand (3,000) shares of Rainier Brewing Company, Inc., a corporation, Class 'A' Common stock.

“That thereafter, and on or about November 30th, 1937, all of the corporate assets of the Rainier Brewing Company, Inc., a corporation, were transferred to Pacific Products, Inc., a corporation, and the name of the Pacific Products, Inc., a corporation, was changed to Rainier Brewing Company, Inc., a corporation. The Anglo California National Bank delivered to the transfer agent all of the stock in the Pacific Products, Inc., a corporation, owned by respondent. Said stock was cancelled and there was re-issued in the name of respondent the number of shares necessary to represent respondent's new ownership in the Rainier Brewing Company, Inc., formerly known as Pacific

Products, Inc., a corporation, whereupon, respondent and Herbert Fleishhacker requested the Anglo California National Bank to deliver to the said Herbert Fleishhacker three thousand (3,000) shares of Rainier Brewing Company, Inc., Class 'A' Common stock, which the said Anglo California National Bank refused to do.

“That the one thousand nine hundred twenty-four and four-tenths (1,924 $\frac{4}{10}$) shares of Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred [93] stock referred to in said agreement between respondent and the said Herbert Fleishhacker were cancelled and became worthless.

“That upon the refusal of said Anglo California National Bank to deliver to Herbert Fleishhacker three thousand (3,000) shares of the Rainier Brewing Company stock referred to hereinabove, the agreement of September 29, 1937, became inoperative and of no force and effect;

“That it became necessary, by reason of said inability of the parties to carry out the terms of said agreement that a new agreement be made, in the meantime of which respondent made certain payments of money to Herbert Fleishhacker, aggregating the sum of One Thousand Eight Hundred Dollars (\$1,800.00).

“That at no time since the making of said

contract referred to herein have any shares of Rainier Brewing Company, Inc., a corporation, Class 'A' Common stock, either of the old company or of the new company, or any of the stock of the Pacific Products, Inc., a corporation, referred to in said contract, been in the possession, actual or constructive, of respondent or Herbert Fleishhacker, or of the Receiver of the estate herein, but, on the contrary, at all times said stock, and each and every share thereof has been and now is in the possession of the Anglo California National Bank and is subject to the terms of a contract of pledge between respondent and said Anglo California National Bank.

“Respondent alleges that any order granting the prayer of the receiver herein would be in excess of the jurisdiction of the above entitled court and that it would be a physical impossibility to comply with any order of [94] this court relative to Pacific Products, Inc., a corporation, stock, as said stock is no longer in existence; that any order against respondent in relation to Rainier Brewing Company stock formerly known as Pacific Products, Inc., a corporation, would be impossible to comply with as the possession, both actual and constructive, of each and every share of said stock is in the Anglo California National Bank, subject to the terms of the pledge by respondent.

“That a true controversy exists between respondent and the estate herein as to what obli-

gation, if any, respondent has to the said estate.

“Wherefore, respondent prays that service of the order to show cause issued by the above entitled court may be ordered quashed on account of lack of jurisdiction of the above entitled court to have issued said order to show cause.

JOSEPH GOLDIE

Respondent.”

[Verification omitted for sake of brevity.]

(See original of said “plea”, handed up herewith as a part of this certificate and report.)

When the aforesaid petition, order to show cause based thereon, and the “plea” thereto, came on for hearing, Francis P. Walsh, Esq., and Louis J. Glicksberg, Esq., appeared on behalf of the receiver herein, C. M. Stark, Esq., of Messrs. Torregano & Stark, appeared on behalf of the respondent, Joseph Goldie, and Harry S. Young, Esq., appeared on behalf of the debtor.

At the commencement of said hearing, the following statements and comments were made: [95]

“Mr. Stark: In that matter, if the Court please, Mr. Goldie has filed a verified plea to the jurisdiction of this Court to hear and determine any controversy between Mr. Carr and himself, and as I understand the procedure, Your Honor is required as a matter of law to

make inquiry into the foundation and basis of the attack on the jurisdiction of the Bankruptcy Court and to rule thereon; whereupon, as I recall the holding in the case of Pierson vs. Higgins, with which Your Honor no doubt is familiar, it will become the duty of the receiver to establish the factual matters of his petition that would entitle him to any relief under his prayer and that the respondent, Mr. Goldie, would have the opportunity to present the factual matters that would tend to deny to the petitioner the relief sought under his prayer. I also understand it to be the law that where the respondent has filed a verified plea to the jurisdiction of this Court, that it becomes the duty of the receiver to establish the existence of jurisdiction. There is no presumption of the jurisdiction by the simple filing of the petition.

“Mr. Walsh: If Your Honor please, in reply to that contention, I might state that the receiver has met the presumption by his pleadings and when the plea to the jurisdiction is raised, the burden is upon the respondent to show at this time that this Court has no jurisdiction to go ahead in this matter. In other words, as the cases hold, the Court has the right to try out the entire matter on the plea to the jurisdiction and if the evidence shows that the contention of the respondent is not meritorious or his right as against the receiver is colorable,

then the Court is bound to go ahead and has the jurisdiction. In other words, we have alleged this matter in our pleading and have attached to the pleading a copy of the agreement, to which there has been no meritorious defense—to that petition. I might state, if Your Honor please, that we have set forth in our petition [96] that Mr. Goldie, under this contract, owes Mr. Fleishhacker, the debtor, or the receiver now, the sum of money now due from dividends which were paid on stock of the Rainier Brewing Company. Now, I will point out to Your Honor there is absolutely no issue raised in this answer on the plea to the jurisdiction or in the plea on the merits, which is set forth in this answer, raising any issue as to the payment of these dividends.

“Mr. Stark: Of course, I cannot, as Your Honor well knows, attack the jurisdiction of Your Honor and in the same breath ask for anything affirmative. The scope of my pleading was to assert that no jurisdiction existed in this Court to determine any matters in regard to Mr. Goldie and there the pleadings stand. I think Your Honor knows, irrespective of counsel’s statement, that when Your Honor has inquired into the question of jurisdiction and ruled, if by chance your ruling should be adverse to Mr. Goldie, thereupon we would have the opportunity to respond to the petition from a factual standpoint.

“Mr. Walsh: If Your Honor please, I might state at this time that in my own mind, the respondent is in Court on his own answer, if Your Honor has read it?

“The Referee: I have read it, yes.

“Mr. Walsh: He has set up an answer to the merits.

“Mr. Stark: The scope of the pleading is limited by the prayer. If Your Honor will examine the prayer, you will see exactly what is sought.

“The Referee: You may proceed to put on the testimony on the question of jurisdiction.”

(See reporter's transcript on hearing on objection to jurisdiction (Joseph Goldie) which is handed up herewith as a part of this certificate and report.)

Thereafter, in substance, the following evidence was offered and received: [97]

As Testified To By Joseph Goldie, the Respondent, As a Witness For The Receiver Under Section 2055, California Code of Civil Procedure:

I reside at 2500 Steiner; my occupation is brewer; I have been connected with the Rainier Brewing Company about 15 years; the Rainier Brewing Company at the present time is a corporation duly authorized to do business under the laws of the State of California, and has its principal place of business in the City and County of San Francisco; for the last two years, commencing, at least

after September 29, 1937, I was an officer of the corporation; prior to September 29, 1937, I was also a stockholder of the Pacific Products Corporation which was duly authorized to do business under the laws of the State of California, and had its principal place of business in the City and County of San Francisco.

Prior to September 29, 1937, I had certain transactions with Herbert Fleishhacker, and on or about September 29, 1937, I entered into a written agreement with Mr. Fleishhacker; that is my signature on the document which you show me purporting to be an agreement, dated September 29, 1937, and that is the signature of Herbert Fleishhacker which I think was signed in my presence.

“Mr. Glicksberg: I offer it in evidence, if Your Honor please.

“Mr. Stark: To which I object, if Your Honor please, on the ground that it is incompetent, irrelevant and immaterial on the question of jurisdiction and the whereabouts and location of this property on the date of the filing of Mr. Fleishhacker's petition.

“The Referee: The objection may be overruled. Admitted strictly on the question of jurisdiction. Receiver's Exhibit No. 1.

“Mr. Stark: Pardon me, Your Honor, I am under the impression that it is not necessary for me to save exceptions.

“The Referee: Isn't there some question as to that under the Ninth Circuit's rulings?

“Mr. Stark: There may be some question and I respectfully except to Your Honor’s ruling.

“The Referee: Very well.”

(See reporter’s transcript hereinbefore referred to, pages 5 and 6 thereof, handed up as a part of this certificate and report.) [98]

When I executed Receiver’s Exhibit No. 1, I also received a duplicate for my own file; I think I have referred to that agreement recently, my attorney has; he has the copy; I have not; I believe, at the time when I executed this agreement, I was the owner of 1,924.4 shares of Class A 7 per cent cumulative preferred stock of Pacific Products, Inc. I did not at any time deliver to Herbert Fleishhacker 539 shares of Pacific Products, Inc., a corporation, class A, 7 per cent cumulative stock as per the terms of this agreement; at no time have I delivered said stock since September 29, 1937, to the present time.

I believe I did deliver dividends to Mr. Fleishhacker since September 29, 1937; I haven’t the dates.

“Mr. Stark: In order to save the Court’s time, I am willing to stipulate that only one delivery of money has been made by Mr. Goldie following the date of the contract, to Mr. Fleishhacker, which delivery was the sum of \$1,800 on September 20, 1938.

“Mr. Glicksberg: Q. That sum of \$1,800 was delivered on account of dividends due to Mr. Fleishhacker?

“The Witness: A. Yes, sir.”

(See reporter’s transcript hereinbefore referred to, page 7 thereof.)

On the 3,000 shares of Rainier Brewing Company class A stock set forth in the agreement, I believe we did receive from the Rainier Corporation on October 21, 1937, \$1.30 per share dividend, I am not sure, but I think we did; I think I received a further dividend on November 20, 1937, of 15 per cent on the Rainier class A stock; September 16, 1938, I received 60 cents a share dividend, which evidently has been paid by this \$1,800 I testified to; on October 24, 1938, a further dividend was declared and paid by Rainier Brewing Company in the sum of \$1.15 on each and every one of the class A Rainier shares, I think; On December 29, 1938, the Rainier Brewing Company further declared an additional dividend of 60 cents, which was payable at the rate of 20 cents per share on the 10th of January, 1939, the 10th of February, 1939, and the 10th of March, 1939; all of those dividends [99] were received by me of the 3,000 shares of stock due to Mr. Herbert Fleishhacker; no payments on dividends have been paid to Herbert Fleishhacker except that \$1,800.

“Mr. Stark: Just a moment, please. We move, Your Honor for the exclusion of the words, ‘3,000 shares due Herbert Fleishhacker’, as assuming something not in evidence and ask that it go out. That is the very controversy.

“The Referee: Doesn’t the contract provide it?

“Mr. Glicksberg: Yes, Your Honor, the contract in the first paragraph.

“The Referee: The motion will be denied.

“Mr. Stark: Exception.”

(See reporter's transcript, page 8 thereof.)

I believe that between the 29th of September, 1937, and the present date I informed Mr. Fleishhacker that I was indebted to him for the dividends set forth; I cannot tell you the exact time or date; to my knowledge I never gave Mr. Fleishhacker any written statement; I don't recall making any statement at any time to Mr. Fleishhacker that he was not entitled to these dividends; there are reasons why these dividends have not been paid to Mr. Fleishhacker; the reason was that there has been a continual discussion between Mr. Fleishhacker and I as to that contract from the time that we first agreed that I was to deliver to him the security of the Pacific Products, which went out of existence and the bank who held my stock at the time refused to deliver the Pacific Products stock to Mr. Fleishhacker or the 3,000 shares; every time a dividend was paid we talked about the question of dividends; my failure to make payment; I don't remember the date exactly when I talked to him, but I presume that every time there was a dividend we talked to each other about it; at no time in these conversations did I tell Mr. Fleishhacker that I was not going to pay those dividends to him; it is a fact that every time I have affirmed my intention to make those payments to Mr. Fleishhacker. [100]

“Q. Is it not also a matter of fact that you communicated with Mr. Fleishhacker and told him that you were indebted to Mr. Fleishhacker for these various dividend payments to you?

“Mr. Stark: Just a minute. Are you referring to a written communication now, Mr. Glicksberg?

“Mr. Glicksberg: I am asking; that is up to the witness.

“The Witness: A. I don’t believe there ever was any written communication; it was all verbal.

“Q. All verbal? A. Yes.

“Q. Are you positive about it?

“A. That is my recollection. I feel that I never corresponded with Mr. Fleishhacker on that. I don’t recall any correspondence on the dividends.

“Q. Do you recall any conversation had with Mr. Fleishhacker when you gave him this \$1,800 check? A. I do not.

“Q. Do you recall ever writing Mr. Fleishhacker when you gave him this \$1,800 check?

“A. No, sir.

“Q. Is it then your testimony at the present time that you did not affirm these dividends in writing?

“Mr. Stark: Just a moment, please. I submit, if Your Honor please, that if Mr. Glicksberg has any writing with regard to this question, which he has been interrogating the wit-

ness on, that the witness is entitled to see this writing.

“The Referee: This is cross examination at this time.

“Mr. Stark: The rule remains the same, I think, Your Honor.

“The Referee: No, he has a right to lay the foundation to impeach the witness on cross examination.

“Mr. Stark: Do I understand that Your Honor overrules the objection?

“The Referee: The objection is overruled.

“Mr. Stark: May I have an exception?

“The Referee: Yes.”

(See reporter’s transcript, pages 9 and 10 thereof.) [101]

I don’t remember that about the 16th of September, 1938, when I made the payment to Mr. Fleishacker of \$1,800, that I affirmed in writing all of the prior dividends that were due to Mr. Fleishacker under the terms of this contract.

“Mr. Stark: I am familiar with that letter.

“Mr. Glicksberg: Q. I show you here an instrument purporting to be a letter dated September 20, 1938, and ask you whether that is signed by you?

“Mr. Stark: We will stipulate that is Mr. Goldie’s signature.

“Mr. Glicksberg: Perhaps the witness would like to refresh his memory, Mr. Stark.

“The Witness: A. I remember that now.

“Q. Did you send that letter to Mr. Fleishhacker? A. Yes.

“Q. Was that letter sent when you forwarded the \$1,800 check?

“A. I believe so.

“Mr. Glicksberg: We offer it in evidence, if Your Honor please.

“Mr. Stark: To which, if Your Honor please, we object on the ground that it is incompetent, irrelevant, and immaterial. I point out it refers to the existence of a debt between Mr. Goldie and Mr. Fleishhacker and this Court has no jurisdiction to collect accounts receivable due the receiver.

“Mr. Glicksberg: Under the law I think counsel is in error, where the debt has been established.

“The Referee: What about the Orinoco Mine case? The objection may be overruled.

“Mr. Stark: May I have an exception, Your Honor?

“The Referee: Yes. Receiver’s Exhibit No. 2.”

(See reporter’s transcript, page 12 thereof.)

Referring to Receiver’s Exhibit No. 2, my answer as to how I arrived at \$4,350, which I claim under this letter was still due Herbert Fleishhacker as dividends paid for the last year, I suppose that was taken off the amount of dividends that had been declared, that is, an amount that is due me which came to \$4,350; I mean the [102] amount that I had

received on these 3,000 shares of stock; that amount, for the purpose of calculation, was the dividend of October 21, 1937, at \$1.30 per share, a further dividend of November 20th at 15 cents per share, which would calculate to the \$4,350 that I set forth in the letter that I was indebted to Herbert Fleishhacker; I have no recollection of a further communication with Mr. Herbert Fleishhacker with reference to the other dividends; I presume that those dividends that I owed were due to Herbert Fleishhacker and were due in accordance with the terms of that contract; those were the only rights Mr. Fleishhacker had against me.

I signed the contract to have the bank deliver to Mr. Fleishhacker the 539 shares of Pacific Products, Inc. class A 7 per cent stock and the bank refused to deliver them, the contract being Receiver's Exhibit No. 1.

“Mr. Stark: Mr. Glicksberg, page 2 of the contract, Receiver's Exhibit No. 1, reads as follows: ‘Now, therefore, this agreement witnesseth: That the parties hereto’, Mr. Fleishhacker and Mr. Goldie, ‘shall forthwith upon the execution of this agreement, cause to be delivered to the transfer agent of Pacific Products, Inc., a corporation, the stock certificate now standing in the name of Joseph Goldie, representing his ownership of 1,924 - 4/10ths shares of Pacific Products, Inc., a corporation, Class A 7 per cent cumulative preferred stock, with directions to said transfer agent and company to split said certificate into one certificate

of 539 shares and one certificate of 1,385 - 4/10ths shares each of said certificates as split, to be reissued by said company and said transfer agent in the name of Joseph Goldie.'

"I call your attention to the fact that it becomes an obligation of the parties to the contract to cause that to be issued.

"Mr. Glicksberg: That is your interpretation. In other words, when you said 'parties' you assumed the word, first party and second party.

"Mr. Stark: Mr. Goldie and Mr. Fleishhacker are the only parties to the contract.

[103]

"Mr. Glicksberg: Yes. But there is nothing in this contract that puts the duty upon Mr. Fleishhacker to do anything.

"Mr. Stark: There is not?

"Mr. Glicksberg: No.

"Mr. Glicksberg: Q. Now, Mr. Goldie, are you familiar with this contract?

"The Witness: A. Yes, sir.

"Q. Or would you like to refresh your memory?

"A. Well, I would like to refresh my memory. I only read it once, at the time I signed it.

"Q. You read it the last time you were in Court?

"A. I looked at it. I did not read it all.

* * * * *

“The Referee: Q. Have you read the contract?

“The Witness: A. Yes.

“Mr. Glicksberg: Q. Now, Mr. Goldie, have you, pursuant to that contract, ever authorized Pacific Products, Inc., a corporation, the transfer agent, to split that certificate of 1,924.4 shares of Pacific Products, Inc. into two certificates?

“A. I believe I did.

“Q. And when?

“A. I cannot tell the exact dates.

“Q. Well, approximately when?

“A. Just about the time, right after we entered into this agreement.

“Q. And to whom did you give this order?

“A. Well, I handed it, I believe, to Mr. Fleishhacker. He in turn handed it over to the secretary of Pacific Products, I presume.

“Q. Have you a copy of the order?

“A. I have not.

“Q. Have you any memorandum at all?

“A. I have not.

“Q. Can you refresh your memory as to the contents of the order?

“A. No, sir. I have no recollection, but I remember when I entered into an agreement with Mr. Fleishhacker that I gave him some sort of a paper to present to the secretary of Pacific Products. [104]

“Q. As a matter of fact, Mr. Goldie, may that not be confused with some of your prior dealings with Mr. Fleishhacker?

“A. No, no, it is just right in connection with this deal. I don’t know whether you are fully aware of the fact that in November, 1937, the Pacific Products was merged.

“Q. That is right.

“A. You have the record, have you?

“Q. That is right. As a matter of fact, the memorandum you refer to was about 1935 or 1936, along in there, before this agreement actually was entered into?

“A. The Pacific Products stock I know was cancelled right at the merger.

“Q. That is right. All I am asking you, Mr. Goldie, is if you can give us any recollection with reference to this order you testified you purportedly gave Mr. Fleishhacker about the time this contract was executed?

“A. I don’t remember.

“Q. Well, as a matter of fact, you did not give him any order at this time? Any order you had given him was prior to that time, about 1935 or 1936? A. Possibly so.

“Q. And then also as a matter of fact after the contract was executed, you did nothing about attempting to transfer this Pacific Products stock to Mr. Fleishhacker?

“A. I could not. There was no way of doing it.

“Q. In other words, you knew of no way you could do it?

“A. No, I did not.

“Q. You neither gave any order to Pacific Products transfer agent or any one else to have this stock cancelled and divided into two certificates?

“A. I knew it could not be done. The bank would not permit it. They held all my Pacific Products stock, which they do up to this day, not Pacific but the Rainier.

“Q. You knew it could not be done, therefore you did not attempt to do it?

“A. Correct.

“Q. Also, you did not attempt to secure for Mr. Fleishhacker 539 shares of Pacific Products class A stock from any other source?

“A. It wouldn't have done me no good. How could I? [105]

“Q. I don't know. There was additional Pacific Products stock?

“A. In my name?

“Q. Which you could have purchased?

“A. No. There was not a share of Pacific Products at any time I know of that could be purchased.

“Q. You did not know where there was sufficient Pacific Products class A stock outstanding other than the stock the bank held on your account?

“A. I did not know it if it was.

“Q. In other words, you did not hold all the stock of Pacific Products?

“A. No, sir.

“Q. There was a total amount issued of at least five or six times in excess of the amount you had?

“A. Just about that. I had about 19 or 20 per cent.

“Q. You did not attempt to make any arrangement with the bank to pay off a portion of your obligation to have this stock delivered to Mr. Fleishhacker, did you?

“A. No, sir.

“Q. You could not do that, either?

“A. No, sir.

“Q. In other words, financially you were not in position to do it? A. Correct.

“Q. Notwithstanding your obligation under the terms of this contract? A. Yes, sir.

“Mr. Glicksberg: No further questions.

“The Referee: Cross examine?

“Mr. Stark: No cross examination, reserving the right, however, to call Mr. Goldie as my own witness.

“The Referee: Very well.

“Mr. Glicksberg: The petitioner rests on the question of the jurisdiction.

“Petitioner rests.

“Mr. Stark: Then, Mr. Goldie, you can resume the stand.

JOSEPH GOLDIE. [106]

Recalled for the Respondent;

“Mr. Stark: I move, your Honor, for an order holding that it is apparent on the face of the record that your Honor has not jurisdiction over Mr. Goldie to determine this controversy between Mr. Goldie and the receiver.

“The Referee: The motion is denied.

“Mr. Stark: May I have an exception?

“The Referee: Granted.

“Mr. Stark: Q. Mr. Goldie, at the time of the making of the contract, Receiver's Exhibit No. 1, dated September 29, 1937, who had possession of the 1,924.4 shares of the class A preferred stock of Pacific Products?

“Mr. Glicksberg: For the record, if your Honor please, we are going to object to that as entirely incompetent, irrelevant and immaterial and an attempt to vary the terms of a written instrument. The contract itself speaks for itself.

“Mr. Stark: The contract does not say that Mr. Goldie had possession of it.

“Mr. Glicksberg: We are bound by the terms of the contract. It is an attempt to incorporate in the terms of the contract a prior oral arrangement that may have been had between the

parties, which we maintain was subsequently merged in the written instrument.

“Mr. Stark: Will your Honor let the reporter read the question back?

“The Referee: Proceed.

“(Question read.)

“Mr. Stark: Now, your Honor, the contract does not state that either Mr. Fleishhacker or Mr. Goldie has possession of the stock.

“Mr. Glicksberg: That is correct. The point we are making is that it is entirely incompetent, irrelevant and immaterial who has possession of the stock. So far as we are concerned, Mr. Goldie has entered a written instrument to deliver a certain number of shares of stock out of a certificate of 1,924 and has a collateral [107] obligation there to perform and any oral arrangement there may be or any intention of Mr. Goldie which he may have had as to where he would secure that 1,924 shares of stock, we maintain is incompetent, irrelevant and immaterial in view of the written contract.

“Mr. Stark: Your Honor, the whereabouts of the stock, not only at the time of the making of the contract, but at the time of the filing of the petition by Mr. Fleishhacker in this proceeding, is in my opinion, and I earnestly urge it, the utter criteria of the very question before your Honor.

“The Referee: You mean the possession of the stock or the possession of the money?”

“Mr. Stark: Either or both.

“The Referee: The objection may be sustained as to the possession of the stock.

“I suppose you want an exception?”

“Mr. Stark: Yes, your Honor.

“Mr. Stark: Q. Following the date of this contract, did you receive any word from Mr. Fleishhacker that he was unable to get the stock of the Pacific Products released from the lien of the pledge of the Anglo Bank?”

“Mr. Glicksberg: One minute. The same objection, your Honor, it is incompetent, irrelevant and immaterial and not within the issues of the case and an attempt to incorporate in the terms of the written instrument conversation after the execution of the written instrument.

“The Referee: Sustained.

“Mr. Stark: Exception. May I make an offer of proof in regard to those two questions, your Honor?”

“The Referee: Surely.

“Mr. Stark: The purpose of the questions, and the respondent will prove, that on the date of the making of the contract that it is asserted gave rise to these rights, all of the stock of Pacific Products, Inc. owned by Mr. Goldie was pledged to the Anglo [108] Bank and the stock

was in the possession of the Anglo Bank on the date of the making of the contract and was also in the possession of the bank subject to the lien of their pledge on the date of the filing of the proceeding in this Court by Mr. Fleishhacker. We offer to prove that.

“The Referee: Very well.”

(See reporter’s transcript hereinbefore referred to, pages 14 to 20 inclusive.)

Referring to the letter of September 20, 1938, the Receiver’s Exhibit No. 2, my attention having been called to the second paragraph which states: “I still owe you dividends paid last year on this stock, amounting to \$4,350, less \$1,394.94 due me, leaving a balance due you of \$2,955.06, which I will pay you at a later date,” that figure, \$1,394.94 refers to money due me from Herbert Fleishhacker; that is a claimed obligation due me from Mr. Fleishhacker at that time; on the date of the filing of the proceeding in this court by Mr. Fleishhacker that money had not been paid to me by him; that money has not been paid to me by the receiver since the filing of the proceeding.

Cross Examination

By Mr. Glicksberg:

This offset of \$1,394.94 was due me in a settlement for some cash money that he owed to the Edward J. Goldie Importation Company, which I took over, that was just part of it and the other was

something else; I don't recall, \$275 or \$300, I haven't the other item; this went back as far as 1933 or 1934 that he owed that for; what I said was that the \$1,119.94 of this purported claimed offset of mine was a debt due by Herbert Fleishhacker to the Edward J. Goldie Importation Company; and the Edward J. Goldie Importation Company was a corporation at that time, it went out of business, I think, in the fall of 1934 or the spring of 1935, I believe; I don't just remember the exact date; I think it went out in 1935; I don't think the Edward J. Goldie Importation Company still did business in 1936; with reference to this purported statement from the Edward J. Goldie Importation Company to H. F. Fleishhacker, I presume this was a statement after [109] they had closed up; I notice there considerable purchases made by Herbert Fleishhacker from the Edward J. Goldie Importation Company during the year of 1936; I know we made a settlement, it was agreed upon that he would pay that at the time that I wrote him the memorandum; when we settled that very memorandum you looked over here, he agreed to it, so did I, that that should be deducted.

“Q. Have you any memorandum to that effect in writing?

“A. Only what you have there.

“Q. What?

“Mr. Stark: Exhibit 2.

“Mr. Glicksberg: Q. This?

“The Witness: A. Yes.

“Q. Did Mr. Fleishhacker ever sign that?

“A. I don’t think so.

“Mr. Stark: It must be apparent that Mr. Fleishhacker has not placed his name on the document. All you have to do is to look at it.

“Mr. Glicksberg: It must be apparent?

“Mr. Stark: That his name is not on there. Why ask this witness a ridiculous question like that?

“Mr. Glicksberg: Ridiculous questions count. I have a right to, Mr. Stark, under cross examination. The witness can refer to the exhibit.

“Mr. Stark: I know these colloquies between counsel are meaningless to you, your Honor. It must be patent that it is not there.

“The Referee: Why continue it, Mr. Stark, when you know it is meaningless?

“Mr. Glicksberg: Q. Mr. Goldie, going back to the purported offset which you claim, the \$1,194.94 is an obligation of Herbert Fleishhacker to the Edward J. Goldie Importation Company, a corporation?

“The Witness: A. It was an obligation to myself. [110]

“Q. Well, have you any assignment of the obligation from the corporation?

“A. It is not necessary. It was our business. We owned it, it belonged to my family.

“Q. That is right, but it still was a corporation? A. Yes, sir.

“Q. At all times it has been conducted as a corporation? A. Yes, sir.

“Q. You individually are only one of the stockholders of the corporation?

“A. The controlling.

“Q. You have control of the corporation, but still you are only one of the stockholders?

“A. Yes, sir.

“Q. At no time have you had an assignment from the Edward J. Goldie Importation Company of the claim which the Edward J. Goldie Importation Company had against Herbert Fleishhacker? A. No, sir.”

(See reporter's transcript hereinbefore referred to, pages 22 to 24 inclusive.)

Redirect Examination

By Mr. Stark

My son, Edward J. Goldie, was president of the Edward J. Goldie Importation Company; this obligation of \$1,119.94 covered sales by the Edward J. Goldie Importation Company to Mr. Fleishhacker, and the Edward J. Goldie Importation Company went out of business; possibly I am mistaken the date it went out of business; I thought it was much before the time this shows; you (Mr. Stark) handled the transaction in regard to the sale of the assets of that corporation;

“Mr. Stark: If I tell you, Mr. Glicksberg, that the transfer of all the physical assets of the Edward J. Goldie Importation Company took place in June of 1936, would you accept that to be the fact?

“Mr. Glicksberg: My associate suggests, Mr. Stark, that we have no objection to stipulating to your statement that the corporation went out of business on that particular date. As to what happened to the physical assets, we would not want to stipulate. [111]

“Mr. Stark: All right. I simply wanted to clear up the minor feature in the testimony of Mr. Goldie that it went out of business in 1935. It was June, 1936, and I believe the disposition of the assets was to a firm known as the Distillers' Distributing Co.”

(See reporter's transcript, pages 24 and 25 inclusive.)

I had a discussion with my son, Eddie, the president of the Edward J. Goldie Importation Company, with regard to this \$1,394.94 owing by Mr. Fleishhacker to the Edward J. Goldie Importation Company. On one or two occasions I discussed the matter of the \$1,394.94 owing from Mr. Fleishhacker to the Goldie Importation Company with Mr. Fleishhacker; I do not recall approximately when the one or two conversations took place; it must have been just two or three months prior to

the date of my letter of September 20, 1938, to Mr. Fleishhacker, that I first spoke to him about it; the conversations took place in his office in the bank, I would say two or three months before September 20, 1938, the date of the letter; I called his attention to the amount due the Edward J. Goldie Importation Company, just two occasions, I brought that up to him; he said, "Take that off the dividends"; (At this point the statement rendered to H. F. Fleishhacker, No. 1 Sansome Street, San Francisco, California, was offered and received in evidence as Receiver's Exhibit No. 3.)

"Mr. Glicksberg: The statement was attached to that letter. We except the portion in writing underneath.

"Mr. Stark: You will agree that the portion on the letterhead of the Rainier Brewing Company can go in, won't you?

"Mr. Glicksberg: That is correct. The pencil notation is not a part of it.

"Mr. Stark: Q. There is a variance in the amount of the statement, \$1,119.94 and the amount referred to in the letter of September 20 as being \$1,394.94, of \$280. Do you know what that \$280 represented?

"The Witness: A. That was a cash item. I cannot recall what that was due for, but he admitted it at the time that it was due to me.

“Q. Some money he owed you?

“A. Money coming to me from him; what for, I cannot recall at this time.

“Q. You discussed the matter of the \$1,119.94? A. Yes.

“Q. And the \$280 to make up the total in the letter of September 20?

“A. Yes, that is right; that is correct.

“Mr. Stark: That is all from Mr. Goldie.

“Recross Examination

“Mr. Glicksberg: Except this further question on recross.

“Q. Irrespective of your conversation with Mr. Fleishhacker, at the time you had that conversation with Mr. Fleishhacker, this \$1,119.94 was due to the Edward J. Goldie Importation Company, a corporation?

“A. Well, I considered it was due to me.

“Q. I appreciate that, but so far as the record? A. He agreed it was due me, too.

“Q. He agreed? A. Yes.

“Q. What did he say?

“A. Well, the fact that he agreed to have it deducted off the amount. He accepted that letter.

“Q. Which letter? Did you pay him anything with reference to the memorandum about the \$4,350? A. Yes, sir.

“Q. You did not make a payment on that account?

“A. I wrote that and he accepted it.

“Q. He accepted the letter?

“A. It was accepted by him.

“Q. At that time you had no title?

“He agreed absolutely to those figures.

“Q. That he owed the Goldie Importation Company \$1,194.94?

“A. And was willing to give me the credit for it because he felt it was my money, it was due Joe Goldie.

“Q. Did you ever give him a bill paid in full from the Edward J. Goldie Importation Company?

“A. I don't remember. Chances are I did.

“Q. Do you remember whether the Edward J. Goldie Company has ever given him a bill paying the obligation in full? [113]

“A. I cannot tell that.

“Q. At the time you made the arrangement with Mr. Fleishhacker, Mr. Goldie, the money was due to the corporation?

“Mr. Stark: Due to whom?

“Mr. Glicksberg: Due to the Goldie Importation Company, a corporation, from Mr. Fleishhacker.

“Mr. Stark: I submit that is absolutely contrary to what the witness testified.

“Mr. Glicksberg: We will submit the question.

“The Referee: He may answer. It is cross examination.

“(Question read.)

“The Witness: A. Well, I again state I considered it was due to me.

“Mr. Glicksberg: Q. You considered it?

“A. Yes, and so did he.

“Q. But you never received an assignment from the corporation?

“A. No, no.

“Q. You never saw to it that the corporation cancelled the obligation of Mr. Fleishacker?

“That figure was cancelled on the books.

“Well, when?

“At the time I took it over.

“Q. Did you cause the obligation to be cancelled?

“A. Off the books; I think it was.

“Q. Are you certain about it?

“A. Pretty sure.

“Mr. Stark: You see, Mr. Goldie was not the bookkeeper for the Edward J. Goldie Importation Company. As a matter of fact, I don't think he was an officer of the company.

“The Witness: No, no.

“Mr. Stark: Although his family and he himself did own all the stock of the company.

“The Witness: That is right.

“Mr. Glicksberg: No further questions.”

(See reporter's transcript, pages 27 to 29 inclusive.) [114]

As testified to by Leon Sloss, called for the respondent:

I reside at 2700 Broadway, San Francisco, and I am connected with the Anglo California National Bank as vice president in charge of collateral loans and keeping of collateral records, things of that nature;

“Q. Has the Anglo California National Bank an account with Mr. Joseph Goldie?

“Mr. Glicksberg: I am going to object to that, if your Honor please, as entirely irrelevant, incompetent, and immaterial and not within the issues of this case.

“The Referee: What is the materiality?

“Mr. Stark: I am going to show, and to save time, if your Honor please, I will offer to show at this time, that the loan records of the Anglo California National Bank will disclose that since 1933 at least, long prior to the transaction in regard to this contract, that all of the stock issued in Mr. Goldie's name in Pacific Products was on deposit with the Anglo California National Bank in pledge to secure a

loan that ranged through a figure of approximately \$165,000, if I remember, down to the present balance of some \$65,000; and, further, at no time has Mr. Goldie has any possession of any of this stock; at no time has Mr. Fleishhacker had possession of this stock. And, following the making of the contract, both Mr. Goldie and Mr. Fleishhacker, pursuant to the terms of it, sought to persuade the bank to release a portion of the Pacific Products stock and subsequently a portion of the Rainier Brewing Company A stock in compliance with the conditions of the contract that that be done, and the bank refused to do it.

“Mr. Glicksberg: To which attempted introduction we object as entirely incompetent, irrelevant and immaterial and an attempt to change the terms of a written instrument and it is not an act which is impossible of performance. Under the terms of the contract it is a collateral obligation and we are not concerned with the rights [115] of these parties, whether it might have been a hardship or not on Mr. Goldie to perform. This is this particular contract.

“Mr. Stark: I think perhaps, your Honor, Mr. Glicksberg has misconstrued the purpose of the offer. The contract, if your Honor will notice, is that the parties to the contract will

perform the mechanics in regard to the delivery of the stock to the transfer agent of the company and have it reissued to split off these shares Mr. Fleishhacker was supposed to get under the contract. I wish to show by this testimony that an effort to do that was made on the part of Mr. Fleishhacker and Mr. Goldie, and the bank refused, being a third party not designated in the contract, to do that act of mechanics.

“Mr. Glicksberg: I am going to object, if your Honor please, on the ground that it is entirely incompetent, irrelevant and immaterial to the issues of the case at the present time. Mr. Stark has twice made the assertion that the use of the word ‘parties’ in the particular contract included both. We maintain it was purely a phraseology of Mr. Stark who drew the instrument. As a matter of fact, Mr. Fleishhacker could do nothing about that so far as the terms of the contract were concerned, if Mr. Goldie refused to deliver the stock for cancellation or make arrangements with the bank to have it divided in its respective form. Under the particular agreement, Mr. Goldie had the obligation to proceed to have the stock divided in two certificates and have one issued to Mr. Fleishhacker as collateral. The mere fact that he had financial obligations which made it finan-

cially difficult for Mr. Goldie to do, certainly cannot warrant an attempt to vary the terms of this written instrument; neither can they bring in attempts of the parties other than based on the four corners of that document.

“The Referee: Do I understand this, Mr. Stark, this condition was prevailing so far as the bank is concerned at the time the contract was drawn?

“Mr. Stark: The situation was this, your Honor: At the time [116] the contract was drawn and many years before that the stock holdings of Mr. Goldie had been pledged to the Anglo California National Bank. The contract was made, and no one knows more about the contract than I do. The contract was made on the statement of Mr. Fleishhacker that he would be able to get a release of a portion of that stock from the pledge.

“The Referee: But, was that incorporated in the contract?

“Mr. Stark: Yes, your Honor.

“Mr. Glicksberg: We submit, if your Honor please, we would like counsel to show us that in the contract.

“The Referee: Point it out, Mr. Stark.

“Mr. Stark: I read it to you once.

“The Referee: I would like to hear it again.

“Mr. Stark: In the first place the contract is signed by Mr. Goldie and Mr. Fleishhacker.

Page 2, the first paragraph of the charging clause of the contract, following the 'Witnesseth' provides:

“ ‘That the parties hereto’, p-a-r-t-i-e-s; not ‘party’; not Mr. Goldie or not Mr. Fleishhacker alone, but the two of them acting jointly together,

“ ‘Shall forthwith, upon the execution of this agreement, cause to be delivered to the transfer agent of Pacific Products, Inc., a corporation, the stock certificate.’

“Nowhere did the contract say the parties should, because the parties knew the stock was pledged to the Anglo Bank.

“Mr. Glicksberg: If your Honor please, we are going to object to Mr. Stark’s making any statement in the record of any intention of the parties that cannot be gathered from the four corners of the instrument. He knows legally that we cannot introduce any intention other than the Court can determine from the written instrument itself. If Mr. Stark, when he drew the instrument, had a different intention, he should have placed it in this instrument to protect his client. He has not done so and I submit that Mr. Goldie is bound by the terms of the instrument as it appears in Court today. [117]

“The Referee: That is the very reason why I wanted to know if this was known to the parties at the time the contract was drawn.

“Mr. Stark: Indeed it was.

“The Referee: Then the offer may be denied and the objection sustained.

“Mr. Stark: That is on the point of my offer of proof?

“The Referee: Yes.

“Mr. Stark: That it was the duty of both parties to perform the mechanics of splitting this stock off.

“The Referee: Yes.

“Mr. Stark: May I have an exception, your Honor?

“The Referee: Yes.

“Mr. Stark: That is all.”

(See reporter's transcript, pages 30 to 33 inclusive.)

As Testified to by Harry T. Thompson, called for by the Respondent:

I am an employee of the Anglo California National Bank; I am acting as secretary for Mr. Herbert Fleishhacker, with the approval of the bank; and have acted as such about 20 years; I do not know of my own knowledge whether or not Mr. Fleishhacker ever made any effort to get any portion of the stock of the Pacific Products Company, standing in the name of Mr. Goldie on pledge with the bank, released from the pledge;

I am familiar with the letter of September 20, 1938, Receiver's Exhibit No. 2, and I know that the item of \$1,394.94 was deducted; my recollection is that it was deducted as a conclusion to conversations that were had between parties;

Cross Examination

By Mr. Glicksberg.

From my records, Mr. Fleishhacker was indebted to the Edward J. Goldie Importation Company for \$1,119.94 of that amount; when I testified that it was deducted, I meant deducted from the dividend due Mr. Fleishhacker on the 3,000 shares; to my knowledge Mr. Fleishhacker has not received any dividends other than that of \$1,800; as [118] to whether the deduction was on my records, I don't know whether I had any record of it or not except the written correspondence; as to whether or not it was considered an obligation of Herbert Fleishhacker to the Edward J. Goldie Importation Company, the letter speaks for itself; it was an obligation of Mr. Fleishhacker to the Edward J. Goldie Importation Company.

Redirect Examination

By Mr. Stark:

“Mr. Stark: Q. Mr. Thompson, the subject matter of this contract had been a matter of conversation between the parties over a period of years prior to taking form?

“A. I understand——

“Mr. Glicksberg: I am going to object to that as entirely incompetent, irrelevant and immaterial.

“Mr. Stark: Don't answer too hurriedly.

“The Referee: It may go out.

“Mr. Glicksberg: As entirely incompetent, irrelevant and immaterial and an attempt to vary the terms of a written instrument.

“The Referee: Yes, if it was prior to the making of the written instrument, the California Code Section takes care of that, Mr. Stark, and the objection is sustained.

“Mr. Stark: May I have an exception, your Honor?

“The Referee: Yes.

“Mr. Stark: Q. Was there any money paid by Mr. Goldie over to Mr. Fleishhacker by way of dividends on the 3,000 shares of Rainier Brewing Company A stock prior to the making of that contract?

“Mr. Glicksberg: We are going to object to that, your Honor, as entirely immaterial, not within the issues before this Court at the present time.

“The Referee: It may be sustained.

“Mr. Stark: May I have an exception, your Honor?

“The Referee: Yes. That is made strictly on the proposition that there is a Code Section that covers all negotiations and matters that happened prior to the making of the contract.

“Mr. Stark: That have been reduced to writing.

“The Referee: And merged in the contract.

“Mr. Stark: Unless there exists an ambiguity in the writing.

“The Referee: In the event there is, I think the only question that can be raised would be a question of fraud.

“Mr. Stark: Of course, we are making no such point as that; simply a failure of the parties to meet from the standpoint of minds.

“The Referee: If there is an ambiguity of the contract, you can give testimony interpreting the contract.

“Mr. Stark: Yes.

“The Referee: But you cannot, as I understand, go back and incorporate in the contract by interpretation something that transpired prior to the making of the contract.

“Mr. Stark: We contend no ambiguity exists. Counsel for the receiver is the one who is contending for the ambiguity.

“Mr. Glicksberg: Oh, no, we are satisfied with the agreement.

“The Referee: If there is no ambiguity, then strictly the objection is sustainable.

“Mr. Stark: All right. Thank you very much, Mr. Thompson.

(Witness excused.)

“Mr. Stark: We rest on the jurisdictional question, your Honor.”

(See reporter's transcript, pages 36 and 37 thereof.)

At the conclusion of the hearing, the matter was submitted on briefs. After the briefs had been filed and considered, in conjunction with the evidence adduced, the following opinion, together with findings, conclusions and order on objection to court's jurisdiction to proceed summarily, was filed:

“There is but one question before the court at this time, that is, has this court the right to proceed summarily against the respondent, Joseph Goldie, who has challenged the court's jurisdiction so to do?

“In passing upon said question, the only record which the court is entitled to have before it is that [120] presented by the verified petition of the receiver, the order to show cause directed against Joseph Goldie, the latter's written objection to the court's jurisdiction, and the evidence produced on the hearing relative to the question of jurisdiction, and not otherwise.

“Based upon such record, and more particularly upon the written objection of said respondent, Joseph Goldie, and said evidence, the court finds the following facts:

“1. That by reason of the form and substance of his written objection to the court's jurisdiction, the respondent, Joseph Goldie, has waived, and did waive, the objection to jurisdiction and now is before the court by a general appearance, and for all purposes;

“2. That by calling the witnesses, Leon Sloss, Jr. and Harry T. Thompson, and subjecting them to oral examination on behalf of said respondent, said respondent, Joseph Goldie, has waived, and did waive, the objection to jurisdiction and now is before the court for all purposes;

“3. That said respondent, Joseph Goldie, at the time of the filing of the petition by the debtor herein, and also at the time of the filing of said petition by said receiver, was, and now is, acting as a trustee of said debtor, and

“4. That said respondent, Joseph Goldie, at the time of the filing of the petition by the said debtor, and also at the time of the filing of said petition by said receiver, was, and now is, indebted to the debtor, but that the court, without waiving the right so to do at a later date, at this time, in passing upon the question of jurisdiction, does not undertake to pass upon the amount of said indebtedness. [121]

“Upon the facts as found herein, the court concludes as matters of law:

“1. That both by his written objection to the jurisdiction and by calling the aforesaid witnesses, the respondent, Joseph Goldie, has appeared herein generally and made a response to the receiver's said petition upon the merits;

“2. That the receiver is entitled to proceed summarily herein against said respondent, Joseph Goldie, a trustee of said debtor;

“3. That said respondent, Joseph Goldie, is entitled to a reasonable time within which to file a further response, upon the merits, to the receiver’s petition and order to show cause, and

“4. That to the end that the matter may be fully presented upon the merits, said respondent, Joseph Goldie, is entitled to the process of this court to have produced such further competent evidence as he may be desirous of offering, whether said evidence is sought to be given by witnesses orally, or by documentary evidence, not including affidavits.

“It is therefore hereby ordered, adjudged and decreed that the objection of the respondent, Joseph Goldie, to the jurisdiction of this court to proceed summarily upon the receiver’s petition and order to show cause be, and it is, overruled, that the said respondent be given five days from this date within which to make further response, upon the merits, to said petition and order to show cause, if he be so advised, and that the hearing upon said petition and order to show cause, upon the merits, be, and said hearing is, fixed for the 19th day of May, 1939, at the hour of 10 o’clock A. M.

Dated: May 5th, 1939.

“BURTON J. WYMAN,
Referee in Bankruptcy.” [122]

(See original of said Opinion, Findings, Conclusions and Order on Objection to Court’s Jur-

isdiction to Proceed Summarily, handed up herewith as a part of this certificate and report.)

Thereafter, and within the time provided by law, there was filed on behalf of the aforesaid respondent, the following verified petition to review referee's order:

“The petition of Joseph Goldie respectfully shows:

“That in the course of the proceedings herein, to-wit, on the 5th day of May, 1939, an order was made by the Referee overruling the plea of your petitioner objecting to the summary jurisdiction of the court, which order is designated ‘Opinion, Findings, Conclusions and Order on Objection to Court’s Jurisdiction to Proceed Summarily’, a copy of which is hereto annexed and marked Exhibit ‘A’.

“I.

“That such order was and is erroneous in that said order purports to hold that by reason of the form and substance of the written objection of your petitioner to the court’s summary jurisdiction your petitioner had waived and did waive the objection to the jurisdiction of the court and was before the court by a general appearance and for all purposes; whereas, your petitioner, in his verified return required to be filed by him, appeared specially and not

otherwise for the sole purpose of objecting to the summary jurisdiction of the court and moving said court for an order quashing the service of the order to show cause made upon him and, in his return to the order to show cause issued by the referee, set forth therein the facts sustaining his plea objecting to the jurisdiction of said court.

“II.

“That said order of the referee was and is erroneous in that the Referee has purportedly held that by reason [123] of your petitioner calling witnesses and submitting them to oral examination on his behalf said petitioner has waived and did waive the objection to the jurisdiction of the court and is now before the court for all purposes; whereas, your petitioner was required, by reason of the order to show cause issued by the Referee, to call witnesses in order to support the facts set forth in his return and offer proof of the transactions had upon which he based his claim as an adverse claimant and to sustain his plea objecting to the summary jurisdiction of the Referee to hear or determine the adverse claim of your petitioner.

“III.

“That said order was and is erroneous in that the said Referee has attempted to make a finding and did make a finding upon the merits of the controversy between your petitioner and

the Receiver in that said order finds as a matter of fact that your petitioner was and now is acting as a trustee of Herbert Fleishhacker, the debtor in the above entitled proceedings.

“IV.

“That said order was and is erroneous in that the said Referee has attempted to make a finding and did make a finding upon the merits of the controversy between your petitioner and the Receiver in that said order finds as a matter of fact that your petitioner was and now is indebted to the debtor, Herbert Fleishhacker.

“V.

“That said order of the Referee was and is erroneous in that said findings of fact that your petitioner was and is a trustee and was and is a debtor of said Herbert [124] Fleishhacker did attempt to finally adjudge that your petitioner has become liable to said Receiver as such trustee and as such debtor, and has denied to your petitioner the right to have the issues as to whether or not your petitioner was and is a trustee of said debtor or was and is indebted to said debtor tried in a plenary proceeding as demanded by said petitioner.

“VI.

“That said order of the Referee was and is erroneous in that the said Referee concludes

as a matter of law that by reason of said findings made by him over the objection of your petitioner appearing specially that your petitioner has appeared generally and made response to the Receiver's petition upon the merits and that said Receiver is entitled to proceed summarily herein against your petitioner as a trustee of Herbert Fleishhacker, the debtor herein.

“VII.

“That said order of the Referee was and is erroneous in that while said order purports to allow your petitioner a right to plead upon the merits and proposes that he subject himself to the summary jurisdiction of the Referee, while in truth and in fact said order has attempted to finally adjudge the issues summarily over the objection of your petitioner, excepting the Referee has reserved a right to determine the amount of the alleged indebtedness by your petitioner to said debtor and his said Receiver.

“VIII.

“That said order was and is erroneous in that upon a further hearing before said Referee, pursuant to his asserted summary jurisdiction, said petitioner will be precluded from the right as a matter of law to present [125] any evidence upon the issues as to whether or not he is or was acting as a trustee for said debtor and whether or not he is or was indebted to said

debtor at the time of the commencement of said proceedings or at the time of the filing of the petition for an order to show cause by the Receiver.

“Wherefore, your petitioner, feeling aggrieved because of such order, prays that same may be reviewed by a judge of this court as provided in the Acts of Congress relating to bankruptcy.

“JOSEPH GOLDIE,
Petitioner.

“TORREGANO & STARK
By CHARLES M. STARK
Attorneys for Petitioner.”

[Verification and copy of the aforesaid Opinion, findings, conclusions and order on objection to court's jurisdiction to proceed summarily, omitted for sake of brevity.]

(See original of said Petition to Review Order of Referee which is handed up herewith as a part of this certificate and report.)

UNDISPUTED FACTS HEREIN

The undisputed facts, according to the record herein, are as follows:

On September 29, 1937, Joseph Goldie, the respondent, and Herbert Fleishhacker, the debtor, entered into the agreement which is marked “Exhibit A”, and is attached to and made a part of the

receiver's petition for a turn-over order.

(See pages 7 to 11, inclusive, of this certificate and report.) [126]

The above referred to agreement was drawn by Charles M. Stark, Esq., the attorney for said respondent.

(See page 39 of this certificate and report.)

On September 20, 1938, said respondent delivered to the debtor herein, Herbert Fleishhacker, \$1800.00, which was a dividend of 60 cents a share on the 3,000 shares of Rainier Brewing Company class A stock mentioned in the agreement; said respondent thought that on October 21, 1937, he had received a dividend of \$1.30 per share from said brewing company; he had received a further dividend of 15 cents per share on said brewing company stock, he thought, on November 20, 1937; on September 16, 1938, said respondent received a further dividend of 60 cents a share upon said stock; he had received a further dividend on said 3,000 shares of stock of \$1.15 per share on October 24, 1938, and on December 29, 1938, said Rainier Brewing Company declared an additional dividend of 60 cents per share upon said last mentioned stock which was payable at the rate of 20 cents per share on January 10, 1939, February 10, 1939, and March 10, 1939, all of which said last mentioned payments had been received by said respondent, but none of which had been paid to the debtor except the sum of \$1,800 referred to hereinbefore.

(See pages 22 and 23 of this certificate.)

Every time a dividend was paid, the respondent affirmed his intention to make the payments to the debtor.

(See page 23 of this certificate and report.)

September 20, 1938, the respondent wrote the debtor the following letter:

“San Francisco, California

“September 20, 1938

“Mr. Herbert Fleishhacker

“No. 1 Sansome Street

“San Francisco, California

“Dear H. F.:

“Herewith my check for \$1800.00 to cover the 60¢ per share dividend just paid by Rainier Brewing Company on the 3000 shares of “A” stock due you from me. [127]

“I still owe you dividends paid last year on this stock amounting to \$4350.00, less \$1394.94 due me, leaving a balance due you of \$2955.06 which I will pay you at a later date.

“Yours very truly,

(Signed)

“JOSEPH GOLDIE.”

(See receiver’s exhibit No. 2, referred to on page 25 of this certificate and report, the original of said letter being handed up herewith as a part of this certificate and report.)

The claimed off-set of \$1,119.94 is claimed by the respondent to be due from the debtor to Edward J. Goldie Importation Company, a corporation.

(See page 32 of this certificate and report.)

Edward J. Goldie Importation Company, of which Edward J. Goldie, respondent's son, was president, was a family corporation which went out of business, June, 1936.

The claim of said corporation against the debtor was never assigned to said respondent.

(See page 34 of this certificate and report.)

On December 31, 1937, Edward J. Goldie, the son of the respondent, Joseph Goldie, sent the following letter on the letterhead of Rainier Brewing Company, Inc., to No. 1 Sansome Street, San Francisco, California, for the debtor:

“San Francisco, California

“December 31, 1937

“Mr. E. Mitchell

“#1 Sansome Street,

“San Francisco, California.

“Dear Eddie:

“Enclosed, herewith, is the statement you requested.

“Very truly yours

(Signed)

EDWARD GOLDIE

“EDWARD J. GOLDIE”

Encl. (1)

EM.”

(See original of said letter which is attached to the statement referred to therein, which said statement and said letter, constitute Receiver's Exhibit No. 3, is handed up herewith as a part of this certificate and report.) [128]

DATE OF FILING DEBTOR'S ORIGINAL PETITION HEREIN

The debtor filed his petition herein seeking the protection of this court under Chapter XI of the Bankruptcy Act, on November 23, 1938.

(See original of said petition on file in the office of the Clerk of this Court.)

SUPPLEMENTAL DISCUSSION BY AND OPINION OF REFEREE

To the end that the reviewing court may further be aided in dealing with the major question presented, the opinion hereinbefore expressed, without citation of authorities, is hereby supplemented by additional discussion, including references to certain decisions which undoubtedly will prove helpful.

Upon the petition for review herein, the court must determine, (1) Whether or not the respondent is before the court by a general appearance by reason of the form and substance of his written objection to the court's jurisdiction, (2) Whether or not the respondent waived the objection to the jurisdiction of the court by reason of the calling of witnesses, Leon Sloss, Jr., and Harry T. Thompson, (3) Whether or not, at the time of the filing of the debtor's petition, and also at the time of the filing of the receiver's petition involved herein, the respondent was the trustee of the debtor, so far as any of the money in controversy is concerned, (4) Whether or not, at the time of the filing of the debt-

or's petition herein, at the time of the filing of the receiver's aforesaid petition, and at the time of the making of the order questioned by the petition for review, said respondent was (and now is) indebted to said debtor in an amount undetermined, and (5) Whether or not, on the undisputed facts, the claim of the respondent appears to be merely colorable.

I. Is there anything contained in the written objection to the court's jurisdiction which converts the so-called special appearance into a general appearance, thereby waiving respondent's right to raise [129] the question of jurisdiction? Unquestionably there is. Beginning on line 28 and ending on line 32 of page 5 of said written objection, page 17 of this certificate and report, this language appears:

“That upon the refusal of said Anglo California National Bank to deliver to Herbert Fleishhacker three thousand (3,000) shares of the Rainier Brewing Company stock referred to hereinabove, the agreement of September 29, 1937, became inoperative and of no force and effect;”

Clearly this is an answer going to the merits of the controversy, in fact to the very heart thereof, i. e., to the validity of the agreement setting forth the rights of the debtor and respondent. This being so, it would appear that the situation presented, so far as this point is concerned, is governed by what was said In re Kornit Mfg. Co., (D.C., N.J.) 192 F. 392, 395, wherein it is declared, “It is ele-

mentary law that neither at law nor in equity can a challenge to the jurisdiction be joined with a defense to the merits. When this is done, the court will disregard the objection to the jurisdiction, and put the defendant to his defense.” As was said in *Massachusetts Bonding & Ins. Co. v. Concrete Steel Bridge Co.*, (C.C.A. 4) 37 F.(2d) 695, 701, “ ‘Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. There are cases where the defendant may make a quasi appearance for the purpose of objecting to the manner in which he is brought before the court, and in fact to show that he is not legally there at all, but if he ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences. If he appears to the merits, no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special [130] purpose or not.’ *Daily Motor Co. v. Reaves*, 184 N.C. 260, 114 S. E. 175, 176.

“ ‘Broadly stated, any action on the part of a defendant, except to object to the jurisdiction over his person, which recognizes the case as in court, will constitute a general appearance.’ 4 *Corpus Juris*, 1333.

“ ‘There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits.’ *Merchants’ Heat & Light Co. v. James H. Clow & Sons*, 204 U. S. 286, 27 S. Ct. 285, 286, 51 L. Ed. 488.”

See, also, *Manning v. Furr*, (Court of Appeals, Dist. of Columbia), 66 F.(2d) 807, 808, *Benedict v. Seiberling*, (D.C., N.D., Ohio) 17 F.(2d) 841, 843, and *Leonardi v. Chase Nat. Bank of City of New York*, (C.C.A., 2) 81 F.(2d) 19, 20, (certiorari denied by Supreme Court of the United States, 298 U. S. 677, 56 S. Ct. 941, 80 L. Ed. 1398) wherein the court, in the latter case, thus stated the rule, “A general appearance is entered whenever the defendant invokes the judgment of the court in any way, on any question other than the court’s jurisdiction without being compelled to do so by previous rulings of the court sustaining jurisdiction.”

It is to be noted that no rulings had been made sustaining the jurisdiction when respondent answered to the merits of the controversy.

See, also, *Blackmer v. United States* (C.A., Dist. of Columbia) 49 F.(2d) 523, 529, the ruling therein being undisturbed on certiorari, 284 U.S. 421, 52 S. Ct. 252, 76 L. Ed. 375.

II. If by any far-fetched interpretation of the respondent’s conduct, it could be said there is nothing contained in his written objection to the court’s jurisdiction, which could convert said objection into

a plea to the merits of the controversy, is there any escape [131] from the proposition that by calling the witnesses in his behalf, under the circumstances present herein, the respondent thereby changed a special appearance, if, upon its face it can be so called, into a general appearance? It would seem that the answer must be in the negative. The rule in this regard is clearly stated in *Poage v. Co-Operative Pub. Co.*, 66 Pac. (2d) 1119, 1125, 57 Idaho, 561, 574, wherein the court said: “ * * * participation in the trial * * * by examining and cross-examining witnesses constituted a general appearance. *Miller v. Prout*, 33 Idaho, 709, 713, 197 P. 1023; *Pittenger v. Al G. Barnes Circus*, 39 Idaho, 807, 811, 230 P. 1011. Finally, if a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection. *Pingree Cattle Loan Company v. Webb & Co.*, 36 Idaho, 442, 446, 211 P. 556; *Pittenger v. Al G. Barnes Circus*, *supra*; *American Surety Co. v. District Court*, 43 Idaho, 589, 598, 254 P. 515; *Burrows v. Burrows*, 10 Cal. App. (2d) 749, 52 P.(2d) 749, 52 P.(2d) 606.”

III. On November 23, 1938, the date upon which the debtor filed his petition herein seeking the protection of this court under Chapter XI of the Bankruptcy Act, and on April 3, 1939, the date upon which the receiver filed the petition here under discussion, was the respondent a trustee, and indebted to the debtor herein?

The record, supplemented by applicable law, shows that the respondent was a trustee and debtor

of the debtor at these times, and for that matter, still is. The rule is that "Every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee * * *" Woodmansee v. Schmitz, 232 N.W. 774, 775, 202 Wis. 242, 246, In re Vorsburgh's Estate, 123 A. 813, 815, 279 Pa. 329, 332. That property in the hands of the trustee of a debtor under the protection of the Bankruptcy Act is constructively in the possession of such debtor and hence is subject to the summary jurisdiction of the court was clearly ruled by the Supreme Court [132] of the United States, in Taubel-Scott-Kitzmiller Co., Inc., v. Fox et. al., 264 U. S. 426, 432, 433, 44 S. Ct. 396, 398, 399, 68 L. Ed. 770, 774, wherein Mr. Justice Brandeis, dealing with the question of possession and the right of a bankruptcy court to proceed summarily where possession is in the debtor, declared: "Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee, where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; where the property is in hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only. As every court must have power to determine, in the first instance, whether it has jurisdic-

tion to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession, actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court."

See, also, *May v. Henderson*, 268 U.S. 111, 115, 45 S. Ct. 456, 458, 69 L. Ed. 870, 873, wherein it is said, "'* * * property held or acquired by others for account of the bankrupt is subject to a summary order of the court, which may direct an accounting and a payment over to the trustee or receiver appointed by the Bankruptcy Court. *White v. Schloerb*, 178 U. S. 542; *Mueller v. Nugent*, 184 U.S. 1; *Babbitt v. Dutcher*, 216 U. S. 102; *Chicago Board of Trade v. Johnson*, 264 U. S. 1."

Even if it could be held that the respondent has a just claim against the debtor, still upon the record the respondent is holding money belonging to the debtor far in excess of any claim which the respondent could establish against said debtor. Under such circumstances, giving the respondent, for the purpose of this discussion only, the [133] benefit of the proposition that he possibly may be holding property which eventually may come to him, his is a joint possession with the debtor, which brings the case within the rule thus stated by Remington on Bankruptcy (4th Ed.) Vol. 5, Section 2365, Page 554, "Possession by the bankrupt may give jurisdiction to the bankruptcy court even if the posses-

sion is not exclusive, * * *'' This rule was followed by this court in *re Latham Square Corporation*, Bankrupt No. 19313 (see special master's opinion and report in 17 Am. B. R. [N. S.] 525), and also *In re Beatrice H. Hanks*, Bankrupt, No. 16898.

See, also, *In re Brooks*, 91 F. 508, 509, and *In re Wegman Piano Co.*, 228 F. 60, 65.

It therefore seems to follow that the respondent, as trustee of this debtor, is not in a position to question the court's jurisdiction to proceed summarily to determine the right of the receiver in behalf of the debtor's estate, as to the money sought to be turned over to said receiver in the proceeding now before the court. This is in keeping with the holding in *Orinoco Iron Co., v. Metzel* (C. C. A. 6) 230 F. 40, 45, wherein it is said: " * * * a debt due the bankrupt's estate is so far constructively in the trustee's possession as to give the bankruptcy court jurisdiction to determine the rights of the parties to it. *In re Ransford*, 194 Fed. 658, 664, 115 C. C. A. 560."

See, also, interesting and enlightening opinion by Augustus N. Hand, Circuit Judge, *In re Worrall* (C. C. A. 2) 79 F. (2d) 88, 90, and to the same effect, *In re Marsters*, (C. C. A. 7) 101 F. (2d) 365, 366, 367, certiorari denied, 306 U. S. 663, 59 S. Ct. 788, 83 L. Ed. 1059.

In the light of the holding in the last mentioned decisions, and regardless of what may be determined in connection with the other points hereinbefore referred to—any one of which appears sufficient to sustain the summary jurisdiction of this

court—there seemingly is no escape from the proposition that, upon the undisputed facts of the case, the claim of respondent is colorable only and consequently such as may be determined in a summary manner. See *May v. Henderson*, *supra*, pages 115, 116, 268 U. S. 45 S. Ct. 458, 459, 69 L. Ed. 874, [134] wherein it is said “Courts of Bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated. *Mueller v. Nugent*, *supra*; *Schweer v. Brown*, 130 Fed. 328, 195 U. S. 171; *Hebert v. Crawford*, 228 U. S. 204; *In re Ellis Bros. Printing Co.* 156 Fed. 430. It may disregard the assertion that the claim is adverse if on the undisputed facts it appears to be merely colorable. *In re Weinger, Bergman & Co.*, 126 Fed. 875; *In re Rudnick & Co.*, 158 Fed. 223; *In re Ransford*, 194 Fed. 658; *Michaelis v. Lindeman*, 196 Fed. 718.”

IV. No point successfully can be made upon the proposition that in passing upon the question of jurisdiction, findings of fact have been made which go to the merits of the controversy. As was said in *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 26, 22 S. Ct. 293, 296, 46 L. Ed. 413, 416, “In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry * * *”

PAPERS HANDED UP HEREWITH

I hand up herewith the following papers:

1. Petition for Summary Order Directed to Joseph Goldie to Turn Over to Receiver Certain Securities and Moneys Belonging to Debtor;
2. Order to Show Cause Directed to Joseph Goldie;
3. Verified Plea of Respondent Joseph Goldie Objecting to the Summary Jurisdiction of the Above Entitled Court and for an Order Quashing Service of Order to Show Cause Directed to said Respondent as Issued by the Above Entitled Court;
4. Points and Authorities;
5. Memorandum of Points and Authorities Submitted in Support of Petition for Summary Order Directed to Joseph Goldie; [135]
6. Opinion, Findings, Conclusions and Order on Objection to Court's Jurisdiction to Proceed Summarily;
7. Petition to Review Order of Referee;
8. Letter dated September 20, 1938, addressed to Herbert Fleishhacker, from Joseph Goldie;
9. Letter dated December 31, 1937, with statement attached, from Edward J. Goldie; and
10. Transcript of Testimony.

Dated: January 25, 1940.

Respectfully submitted,

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed Jan. 25, 1940. [136]

In the Southern Division
of the United States District Court
for the Northern District of California.

No. 30924-S

In the Matter of

HERBERT FLEISHHACKER,
Debtor.

ORDER

Ordered:

1. That the "Certificate and Report of Referee on Petition for Review of Order of Referee on Objection of Joseph Goldie to Court's Jurisdiction to Proceed Summarily," filed herein on January 25, 1940, is hereby Approved and Confirmed.

2. That the order made by the Referee in Bankruptcy on May 5, 1939, in which it was "ordered, adjudged and decreed that the objection of the respondent, Joseph Goldie, to the jurisdiction of this court to proceed summarily upon the receiver's petition and order to show cause be, and it is, overruled," etc., is hereby Affirmed and Adopted.

Dated: April 26, 1940.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Apr. 26, 1940. [137]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER OF
DISTRICT COURT AFFIRMING THE
REVIEWED ORDER OF REFEREE IN
BANKRUPTCY.

To the above entitled Court and to the Clerk thereof, and to Sterling Carr, as Receiver of the Estate and Effects of the above named Debtor:

Notice is hereby given that Joseph Goldie, herein referred to as respondent, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit.

From the order made and entered April 26th, 1940, by the above entitled Court approving and confirming the certificate [138] and report of Referee on petition for a review of order of Referee on the objection of respondent Joseph Goldie to Court's jurisdiction to proceed summarily, which order of Referee was filed herein on January 25th, 1940.

From said order made and entered on April 26th, 1940, by the above entitled Court affirming and adopting an order made by the Referee in Bankruptcy on May 5th, 1939, in which it was "ordered, adjudged and decreed that the objection of the respondent, Joseph Goldie, to the jurisdiction of the above entitled Court to proceed summarily upon the receiver's petition and order to show cause be and it is overruled, etc."

That the amount involved in this appeal and the value of the property affected by the orders of the said Referee and said District Court and each of them is more than Five Hundred Dollars (\$500.00).

Dated: May 23d, 1940.

TORREGANO & STARK

By CHARLES M. STARK

Attorneys for Joseph Goldie,
Appellant
805 Mills Building
San Francisco, California

The address of Attorneys for the appellee, Sterling Carr, as Receiver of the estate and effects of Herbert Fleishhacker, Debtor:

Messrs. Francis P. Walsh and Louis J. Glicksberg, 1 Montgomery Street, San Francisco.

Received a copy of the foregoing Notice of Appeal this 23d day of May, 1940.

FRANCIS P. WALSH

LOUIS J. GLICKSBERG

Attorneys for Sterling Carr,
Appellee.

[Endorsed]: Filed May 23, 1940. [139]

[Title of District Court and Cause.]

STATEMENT OF POINTS PURSUANT TO
RULE 75(d) FEDERAL RULES OF CIVIL
PROCEDURE.

Now comes Joseph Goldie, appellant herein, and, pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, sets forth a statement of the points on which appellant intends to rely on appeal, as follows, to-wit:

Point I.

That the above entitled court has no jurisdiction of appellant.

Point II.

That at no time during the course of said proceeding did [140] appellant submit to the jurisdiction of said court, but at all times appellant seasonably objected to the asserted jurisdiction of said court.

Point III.

That appellant did not by the allegations of fact contained in his written return to the order to show cause directed to him by the said court pursuant to the petition of Sterling Carr, as receiver, etc., thereby submit to the jurisdiction of said court or thereby waive his said objection to said asserted jurisdiction.

Point IV.

That appellant did not by calling witnesses and examining them on his objection to the jurisdiction of said court thereby waive his objection to said jurisdiction.

Point V.

That appellant was not a trustee for said debtor but, to the contrary, appellant's claim to the property sought to be summarily seized from appellant by appellee was real, adverse and more than colorable.

Point VI.

That the ruling of the referee in bankruptcy that the above entitled court had jurisdiction over appellant in a summary proceeding and the order of the United States District Judge affirming said referee on review was error.

Wherefore, appellant prays that said order and decree of said court be reversed and said appellee be remitted to a plenary action in the premises.

Dated: May 23d, 1940.

JOSEPH GOLDIE,

Appellant

By ERNEST J. TORREGANO

By CHARLES M. STARK

His Attorneys.

[Endorsed]: Filed May 23, 1940. [141]

[Title of District Court and Cause.]

COST BOND ON APPEAL.

Know All Men By These Presents: That we, Joseph Goldie, as Principal, and the American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and authorized to transact business in

the State of California, as Surety, are held and firmly bound unto Sterling Carr, as receiver of the estate and effects of Herbert Fleishhacker, Debtor, appellee in the above entitled proceedings, in the sum of Two Hundred Fifty Dollars—(\$250.00)—to be paid to the said appellee, for the payment of which well and truly to be made we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of May, 1940.

Whereas, an Order was made by the said District Court of the United States on or about the 26th day of April, 1940, confirming an order of the referee in bankruptcy on petition of said Joseph Goldie for a review of an order made herein on or about the 5th day of May, 1939, by Burton J. Wyman, Referee in Bankruptcy, for said District Court. The said order of the Referee in Bankruptcy overruled the objection of Joseph Goldie to the jurisdiction of the above entitled court to proceed summarily upon the Receiver, Sterling Carr's petition and order to show cause.

Now, Therefore, the condition of this obligation is such that if the said Joseph Goldie, Appellant, shall prosecute his said appeal to effect, and answer and pay all costs of appellee if appellant fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and effect.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition

thereof, the above-named District Court may upon ten days' notice to the Surety above named, proceed summarily in said action or suit to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against said Surety and award execution therefor.

In Witness Whereof, the signature of the said principal is hereto affixed, and the corporate seal and name of the said Surety is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 21st day of May, 1940.

JOSEPH GOLDIE

(Principal)

AMERICAN SURETY COM-
PANY OF NEW YORK

By: L. T. PLATT

Res. Vice-President.

Premium \$10.00 per annum.

Attest:

B. DUCRAY

Res. Asst. Secretary.

Bond #520627-K

[Endorsed]: Filed May 23, 1940. [142]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL.

Joseph Goldie, appellant in the above entitled proceeding from the order made by the above entitled court on the 26th day of April, 1940, confirm-

ing certificate and report of Referee in connection with a proceeding to adjudicate in a summary action an adverse claim of appellant, and from which order appellant has appealed, hereby presents his designation of the portions of the records, proceedings and evidence to be contained in the record on appeal, to-wit:

1. Petition by receiver Sterling Carr for summary order [143] directed to Joseph Goldie to turn over to receiver certain securities and moneys, dated April 3, 1939, with Exhibit "A" attached thereto;

2. Order to show cause directed to Joseph Goldie issued by referee, dated April 3d, 1939, pursuant to said petition;

3. Verified plea of respondent Joseph Goldie objecting to the summary jurisdiction of the above entitled court, and for an order quashing service of order to show cause directed to said respondent as issued by the above entitled court, which verified plea, etc., is dated April 13th, 1939;

4. Transcript of testimony in its entirety, together with a letter dated September 20, 1938, addressed to Herbert Fleishhacker from Joseph Goldie and a letter dated December 31st, 1937, with statement attached from Edward J. Goldie to Mr. E. Mitchell;

5. Petition of Joseph Goldie filed May 12th, 1939, to review order of referee, dated May 5th, 1939;

6. Order of United States District Judge A. F. St. Sure, dated April 26th, 1940, affirming order of referee dated May 5th, 1939;
7. Notice of appeal;
8. Cost bond on appeal;
9. This praecipe.

Dated: May 23d, 1940.

ERNEST J. TORREGANO
CHARLES M. STARK

Attorneys for appellant
Joseph Goldie.

[Endorsed]: Filed May 23, 1940. [144]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF THE RECORD ON APPEAL, RE-
QUESTED BY STERLING CARR, RE-
CEIVER FOR THE ESTATE OF HER-
BERT FLEISHHACKER, THE DEBTOR
HEREIN.

To the Clerk of the Above Entitled Court:

The following is a designation of additional portions of the record, proceedings and evidence to be contained in the record on appeal in the above entitled matter, as requested by Sterling Carr, Receiver for the estate of Herbert Fleishhacker, the above named Debtor, and the Respondent herein.

1. Certificate and report of Burton J. Wyman,

Referee, on petition for review of order of Referee on objections of Joseph Goldie to Court's jurisdiction to proceed summarily;

2. Receiver's Exhibit No. 1 as of April 21, 1939, being that certain agreement by and between Herbert Fleishhacker (the above named Debtor) and Joseph Goldie, and dated September 29, 1937;

3. Receiver's Exhibit No. 2 as of April 21, 1939, being that certain letter dated September 20, 1938, signed by Joseph Goldie.

Dated: May 29, 1940.

FRANCIS P. WALSH

Russ Bldg.

LOUIS J. GLICKSBERG,

625 Market

Attorneys for Sterling Carr,
Receiver for the estate of
Herbert Fleishhacker, Debtor.

[Endorsed]: Filed May 31, 1940. [145]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 145 pages, numbered from 1 to 145, inclusive, contain a

full, true, and correct transcript of the records and proceedings in the Matter of Herbert Fleishhacker, Debtor, No. 30924 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Twenty-one Dollars and 15/100 (\$21.15) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of June A. D. 1940.

[Seal]

WALTER B. MALING

Clerk.

E. H. NORMAN

Deputy Clerk.

[Endorsed]: No. 9553. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Goldie, Appellant, vs. Sterling Carr, Receiver of Estate of Herbert Fleishhacker, Debtor, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 18, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9553

In the Matter of

HERBERT FLEISHHACKER,
Debtor.

DESIGNATION OF POINTS ON WHICH
APPELLANT INTENDS TO RELY.

To Paul P. O'Brien, Esq., Clerk of the Above Entitled Court and To Sterling Carr, Esq., Receiver of the Estate of the Above Named Debtor, and To Francis P. Walsh, Esq. and Louis J. Glicksberg, Esq., His Attorneys:

You Will Please Take Notice that the appellant in the above entitled appeal hereby adopts as appellant's points on appeal the statement of points on appeal, and each of them, appearing in the transcript of the record on appeal in the above entitled action.

Dated: June 21st, 1940.

ERNEST J. TORREGANO
CHARLES M. STARK

Attorneys for Appellant,
Joseph Goldie.

Due service of the foregoing notice is hereby admitted this 21st day of June, 1940.

FRANCIS P. WALSH

LOUIS J. GLICKSBERG

Attorneys for Appellee
Sterling Carr, Receiver
of the above named Debtor.

[Endorsed]: Filed Jun. 21, 1940.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD CON-
SIDERED NECESSARY BY APPELLANT
FOR THE CONSIDERATION OF THE
ABOVE ENTITLED COURT OF THE AP-
PEAL PURSUANT TO RULES OF PRAC-
TICE #19, SUBDIVISION 6.

To Paul P. O'Brien, Esq., Clerk of the Above En-
titled Court and To Sterling Carr, Esq., Re-
ceiver of the Estate of the Above Named
Debtor, and To Francis P. Walsh, Esq. and
Louis J. Glicksberg, Esq., His Attorneys:

You Will Please Take Notice that as provided in
the rules of Practice of the above entitled court
(Rule #19 Subdivision 6) appellant designates as
the parts of the record considered necessary on said
appeal the following:

1. All of the transcript of the record received by the clerk of the above entitled court from the United States District Court except the Certificate and Report of Burton J. Wyman, Referee, on petition for review of order of Referee on objections of Joseph Goldie to court's jurisdiction to proceed summarily.

2. The designation of points on which appellant intends to rely.

3. This designation of points of record considered necessary.

Dated: June 21st, 1940.

ERNEST J. TORREGANO

CHARLES M. STARK

Attorneys for Appellant,
Joseph Goldie.

Due service of the foregoing designation is hereby admitted this 21st day of June, 1940.

FRANCIS P. WALSH

LOUIS J. GLICKSBERG

Attorneys for Appellee,
Sterling Carr, Receiver of
the above named debtor.

[Endorsed]: Filed Jun. 21, 1940.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTION OF RECORD CONSIDERED NECESSARY BY SAID APPELLEE FOR CONSIDERATION BY THE ABOVE ENTITLED COURT OF SAID APPEAL, PURSUANT TO THE RULES OF PRACTICE OF SAID CIRCUIT COURT OF APPEALS.

To Paul P. O'Brien, Esq., Clerk of the Above Entitled Court; and To Joseph Goldie, Appellant Herein; and To Ernest J. Torregano and Charles M. Stark, Esqs., His Attorneys:

You, and each of you, will please take notice that as provided in the Rules of Practice of the above entitled Court (Rule 19, subdivision 6), the Appellee designates as an additional part of the record considered by said Appellee to be necessary on said appeal, the following:

(1) Certificate and Report of Burton J. Wyman, Referee, on petition for review of order of Referee on objections of Joseph Goldie to court's jurisdiction to proceed summarily;

(2) This designation of additional points of record considered necessary by said Appellee.

Dated: June 25th, 1940.

FRANCIS P. WALSH

LOUIS J. GLICKSBERG

Attorneys for Sterling Carr,
Receiver for the estate of
Herbert Fleishhacker, Debtor,
Appellee.

Received a copy of the within this 25th day of
June, 1940.

TORREGANO AND STARK

Attorneys for Appellant.

[Endorsed]: Filed Jun. 25, 1940.